NO. 96979-5

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON COALITION FOR OPEN GOVERNMENT,

Petitioner/Plaintiff,

v.

PIERCE COUNTY,

Respondent/Defendant.

ANSWER TO PETITION FOR REVIEW

FREIMUND JACKSON & TARDIF

JOHN R. NICHOLSON
Special Deputy Prosecuting Attorney
WSBA #30499
900 SW 16th Street, Suite 215
Renton, WA 98057
(206) 582-6001

Attorneys for Respondent
Pierce County

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I. INTRODUCTION

Respondent, Pierce County ("the County"), submits this answer to the petition filed by the Washington Coalition for Open Government ("WCOG") seeking this Court's review of an unpublished unanimous opinion[1] by the Court of Appeals affirming the trial court's ruling[2] in the County's favor in its action under the Public Records Act ("PRA"). Because the Court of Appeals' decision follows well-settled precedent and does not conflict with any prior decision of this Court or the Court of Appeals, review should be denied.

II. COUNTER-STATEMENT OF THE CASE

WCOG's counsel made a PRA request to the County Prosecuting Attorney's Office in April 2015 seeking a large volume of County litigation records from *Nissen v. Pierce County*,[3] another PRA lawsuit which involved requests for disclosure of records from the personal cell-phone of the County's former Prosecuting Attorney, Mark Lindquist. The *Nissen* case was pending for several years, because it advanced from the Superior Court, which initially dismissed it under Rule 12 (b)(6), to the Court of Appeals, to this Court, and then back to Superior Court on remand. *See Nissen, supra.*

[1] A copy of the Court of Appeals' unpublished opinion is attached as **Appendix A**.
[2] A copy of the trial court's decision is attached as **Appendix B**.
[3] *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015).

One of the requests at issue in *Nissen* sought not merely work-related records from Lindquist's cell phone, but all records on the phone from a particular date, without any limitation. *Nissen*, 183 Wn.2d at 869-70; CP 37-38. Thus, while the County was the defendant agency in *Nissen*, Lindquist also retained his own personal attorney and intervened in the case. CP 42-44. The County and Lindquist took identical positions in *Nissen*: both argued that the records at issue were not public records and that requiring their disclosure would infringe on the privacy rights of public officials and employees. CP 46-102. During the appellate stage of the *Nissen* case, several organizations filed *amicus curae* briefs that also advocated for this position: the Washington Association of Prosecuting Attorneys ("WAPA"), the Washington Association of Municipal Attorneys ("WSAMA"), and several labor organizations whose constituents are public employees ("Public Employees"). CP 103-194. These organizations participated as amici in *Nissen* specifically for purposes of supporting the County and Lindquist. CP 1829-31.

Ultimately, this Court held in *Nissen* that most of the records at issue, such as call logs, were not public records. *Nissen*, 183 Wn.2d at 882-83. It held that transcripts of the content of text messages were potentially public records if they were work-related. *Id*. at 883. This Court directed

Lindquist on remand to perform a search of records and prepare an affidavit with sufficient information to allow the Superior Court to determine that any records withheld are not public records. *Id*. at 886-87.

As summarized by the Court of Appeals' unpublished decision in this case: "In response to WCOG's PRA request, the County claimed that hundreds of drafts, draft pleadings, handwritten notes, legal research, and correspondence related to the *Nissen* litigation were exempt from production as work product. As such, the County redacted these communications and documents either in part or in full in its response to WCOG's PRA request." Unpublished Opinion at 9. WCOG then sued the County under the PRA based upon its work product exemptions and other theories. CP 2083-93.

The trial court scheduled a merits hearing on all WCOG's claims on April 21, 2017. CP 2065. At the hearing, WCOG advanced three theories. First, WCOG argued the County violated the PRA, because the County mailed some of the records rather than transmitting them electronically and it sent paper copies of one installment of records rather than sending them in an electronic format (i.e., PDF files). CP 2019-20. Second, WCOG claimed the County's work product exemptions were improper and that the County waived any work product protections in litigation records that it

shared with Prosecutor Lindquist, WAPA, WSAMA, or Public Employees. CP 2013-18. And third, WCOG claimed the County's exemption logs asserting work product were inadequate, because they did not provide detailed information about the common interest shared between the County, Lindquist, and the above amicus groups to explain why work product was not waived. CP 2019.

On June 15, 2017, the trial court issued a letter decision ruling in favor of the County on all WCOG's theories. CP 356-60. The trial court's decision was reduced to an order of dismissal entered on July 21, 2017. CP 354-55. WCOG appealed on August 11, 2017. CP 362-69. On February 20, 2019, the Court of Appeals issued its opinion affirming the trial court in all respects.

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

WCOG's petition should be denied, because none of the criteria for discretionary review under RAP 13.4 (b) are satisfied. The Court of Appeals' holding that the County did not violate the PRA when it produced some installments of records by mailing them and/or providing hard copies rather than PDF electronic files is consistent with multiple cases from all three divisions of the Court of Appeals. Further, the Court of Appeals correctly applied the analysis in this Court's relatively recent decision in

Kittitas County v. Allphin, 190 Wn.2d 691, 416 P.3d 1232 (2018), when it held the County did not waive work product protections for its *Nissen* litigation records. Unpublished Opinion at 11-12. The Court of Appeals' conclusion that "the County did not violate the PRA by failing to explain in detail in its exemption logs how an exception to the waiver of a claimed exemption applied to the redacted records" is likewise consistent with, rather than contrary to, both the language of the PRA and this Court's prior decisions. WCOG fails to establish any conflict in the case law or error justifying this Court's review.

A. The Court of Appeals' Conclusion that the County's Method of Producing Records Did Not Violate the PRA is Consistent With Well-Settled Case Law From All Three Divisions of the Court of Appeals

WCOG asserted a claim under RCW 42.56.100 based upon the County's production of one installment of records on paper rather than electronically and its transmittal of some records by United States mail rather than by e-mail or internet file transfer. CP 2019-20. WCOG has also characterized this claim as being based upon the County's failure to adopt rules providing for the "fullest assistance" to requestors. *Id*.

As a preliminary matter, an actionable PRA violation requires a requestor to establish that he or she has wrongfully been denied access to a public record or that an agency's estimate of time for responding to a request

for records is unreasonable.[4] RCW 42.56.100 requires agencies to adopt rules relating to public records but does not give rise to a cause of action in Superior Court.

As the Court of Appeals recognized, the County did adopt rules governing public records requests, Pierce County Code 2.04: "Public Records Inspection and Copying Procedures." This satisfies the County's statutory duty under RCW 42.56.100. The court correctly held the statute does not require agencies to adopt rules specifically relating to the electronic production of records. The Attorney General's Office model rules include provisions relating to the production of records electronically, but these rules are advisory only and do not bind agencies. WAC 44-14-00003; *West v. Dept. of Licensing*, 182 Wn. App. 500, 516, 331 P.3d 72 (2014), *review denied*, 181 Wn.2d 1027, 339 P.3d 634 (2014). All three divisions of the Court of Appeals have previously held that nothing in the PRA requires records to be produced electronically. *Doe L v. Pierce County*, 7 Wn. App.2d 157, 433 P.3d 838 (2018); *Benton County v. Zink*, 191 Wn. App. 269, 282, 361 P.3d 801 (2015), *review denied*, 185 Wn.2d 1021, 369 P.3d 501 (2016); *Mitchell v. Dept. of Corrections*, 164 Wn. App. 597, 606, 277

[4] "The PRA provides a cause of action for two types of violations: (1) when an agency wrongfully denies an opportunity to inspect or copy a public record or (2) when an agency has not made a reasonable estimate of the time required to respond to the request." *Andrews v. Washington State Patrol*, 183 Wn. App. 644, 651, 334 P.3d 94 (2014) (citing RCW 42.56.550 (1),(2)).

P.3d 670 (2011); *Mechling v. City of Monroe*, 152 Wn. App. 830, 849, 222 P.3d 808 (2009). Thus, the Court of Appeals' decision follows a long line of well-settled precedent. In contrast, no prior reported case has treated an agency's failure to produce records electronically (or its failure to adopt specific rules) as a PRA violation for which penalties or fees may be awarded, as WCOG would ask this Court to do.[5] It bears noting that notwithstanding the lack of any legal requirement, here the County did produce the overwhelming majority of records to WCOG electronically.[6]

WCOG's claim that the decision of Division II conflicts with the decisions of Division I in *Kleven v. Des Moines*, 111 Wn. App. 284, 44 P.3d 887 (2002), and *ACLU v. Blaine School Dist*., 88 Wn. App. 688, 44 P.2d

[5] Some courts have exercised their broad equitable powers to order an agency to produce records electronically if it is reasonable and feasible for the agency to do so *See, e.g., Mechling*, 152 Wn. App. at 850 ("on remand the trial court shall determine whether it is reasonable and feasible for the City" to produce records electronically). *Mitchell*, 164 Wn. App. at 607 (affirming trial court ruling not requiring electronic production). WCOG never briefed the standing requirements for an injunction ordering the County to adopt additional rules or to produce records electronically, specifically: "(1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) actual and substantial injury as a result." *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 445-46, 327 P.3d 600 (2013)(citing *Wash. Fed'n of State Employees v. State*, 99 Wn.2d 878, 888, 665 P.2d 1337 (1983)).Given the County had long been producing records electronically, WCOG would have been unable to satisfy these requirements if it had ever raised the issue properly. Thus, there was no reason for the trial court to consider this sort of injunctive relief when it made its ruling.

[6] By the time of the hearing, thousands of pages of records had been produced to the requestor in six installments. CP 436-37, 440-42. Only the first installment of records, consisting of 533 pages, was sent to the requestor in paper format. CP 459-60, 499.The second through the fifth installments were sent to the requestor on CD in an electronic format (PDF). CP 461-63. In May of 2016, the Prosecuting Attorney's Office approved use of a system called Filelocker for producing records in electronic format via internet download. CP 436-37, 443-44. All subsequent installments were produced to the requestor electronically using Filelocker. CP 434-37.

1176 (1997), is also without merit. In *Kleven*, the requestor claimed the defendant City was liable under the part of RCW 42.56.100 requiring rules "to protect records from damage or disorganization," because the City had mislabeled a single audiotape that was responsive to a PRA request. *Kleven*, 111 Wn. App. at 297. The Court of Appeals rejected this claim, given that the City promptly produced the mislabeled tape. *Id*. As the trial court below correctly observed: "The record in *Klevin* contained no information to show that the City had not adopted or enforced rules and regulations, and so the Court of Appeals did not address that issue." CP 426. As a result, there is no conflict between the decision of Division I in *Klevin* and the opinion of Division II here.

In *ACLU,* Division I held that an agency's refusal to send records by mail and its insistence that a Seattle-based requestor travel to Blaine to review and copy records was a violation of the PRA. *ACLU,* 88 Wn. App. at 694-95. The court focused on the provision of the PRA stating that "agencies shall honor requests received by mail for identifiable public records unless exempted by provisions of this chapter." *Id*. (citing RCW 42.17.270, now re-codified as RCW 42.56.080). Based on the legislative history of this provision the court concluded: "This statement can only be interpreted to require agencies to provide copies of identifiable public

records by mail when requested to do so." *Id*. at 695. *ACLU* requires an agency to mail records when requested, but it states nothing about any requirement to send records electronically.

Put simply, as a matter of law an agency meets its PRA obligation to disclose records "by promptly mailing copies at a reasonable charge . . ." *Sappenfield v. Dept. of Corrections*, 127 Wn. App. 83, 89, 110 P.3d 808 (2005). Neither *Kleven* nor *ACLU* support WCOG's argument under RAP 13.4 (b)(2) that the unpublished opinion of Division II here is "in conflict with" other decisions by Division I. As discussed above, in *Mechling* Division I reached the same holding as Division II did here. *Mechling*, 152 Wn. App. at 849. Review should therefore be denied.

B. The Court of Appeals' Conclusion that the County Did Not Waive Work Product Protections in *Nissen* Litigation Records By Sharing Them With Other Aligned Parties is Consistent With This Court's Established Case Law

WCOG's contention that the trial court and Court of Appeals reversed the burden of proof when they concluded the County's work product exemptions were proper is belied by the record. The trial court explicitly recognized "[t]he agency bears the burden 'to establish that refusal to permit public inspection and copying in accordance with a statute that exempts or prohibits public disclosure.'" CP 358 (quoting RCW 42.56.550 (1)). It went on to hold, "Pierce County has met its burden to

establish that a PRA exemption (work product) applies to these documents." CP 359. The Court of Appeals likewise recognized the County's burden under the statute. Unpublished Opinion at 8. Thus, there was no reversal of the applicable burden.[7] Instead, WCOG is simply arguing the lower courts made an error when they determined the County met this burden. This does not satisfy the criteria for review invoked by WCOG. *See* RAP 13.4 (b)(1). This Court is not an "error-correcting" court. *See generally* RAP 13.1(a), 13.4(b). Consequently, even without reaching the merits, WCOG's petition should be denied.

In any case, WCOG fundamentally misconstrues the doctrine of waiver. "A waiver is the intentional and voluntary relinquishment of a

[7] RCW 42.56.550 (1) places the burden on an agency to establish that an exemption is properly asserted. However, the trial court correctly noted, citing *Adams v. Dept. of Corrections*, 189 Wn. App. 925, 952, 361 P.3d 749 (2015), that in all other respects a plaintiff still has the burden of establishing the elements necessary for recovery. CP 358. This statement was a recognition of the County's objection that WCOG did not identify which specific exempt records out of the thousands disclosed by the County WCOG was challenging. As the plaintiff in Superior Court, WCOG was required to file the opening brief for the merits hearing. CP 2065. The County was required to file a response, and WCOG was permitted to file a reply. *Id*. Without the requestor identifying the specific records it is challenging, there is no way for the agency or the court to determine whether *in camera* review of those records is necessary. Despite this, WCOG insisted it did not even have the minimal burden as the plaintiff of identifying which records it was disputing were exempt, instead stating that simply providing "examples that highlight why the exemption claims were wrong" satisfied any burden it had. 04/21/17 RP at 8-9, 55. The trial court disagreed, noting "the Plaintiff has failed to even identify which specific records are at issue that purportedly lost their work product privilege because they were shared," and consequently "[t]he merits hearing did not involve a challenge to any particular document withheld or redacted." CP 359-60. While WCOG did not satisfy its burden of identifying all the specific exempt records it was challenging, the Court nevertheless dealt with its allegation "in a generic way that the work product privilege does not apply because some or all of the documents were shared outside the attorney-client relationship." CP 359. The trial court rejected that claim, as noted *infra*.

known right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive." *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998)(citing *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954)). And contrary to WCOG's assertion, it is the party who claims that a waiver occurred – not the party denying it – who bears the burden of proof of establishing waiver. *Jones*, 134 Wn.2d at 241-42; *Steel v. Olympia Early Learning Ctr.,* 195 Wn. App. 811, 832, 281 P.3d 111 (2016). Non-waiver is not an element of establishing work product or any other privilege.

WCOG attempted to manufacture an argument that the County waived any work product protection in records it shared with Lindquist by claiming that the then Pierce County Prosecuting Attorney was an "adverse party" to the County in *Nissen*. As both the trial court and Court of Appeals held, the record in *Nissen* is clear that neither Prosecutor Lindquist nor any of the relevant amicus groups were adverse to the County. The undisputed record establishes they all took the same position in the litigation, specifically that Prosecutor Lindquist's private cell phone records were not public records and that requiring their disclosure would infringe on the privacy rights of public officials and employees. In its effort to resurrect this argument, WCOG relies on legal conclusions from the declaration of an

attorney it hired, which stated Lindquist had a conflict of interest in *Nissen*. But the trial court correctly granted the County's motion to strike those legal conclusions as inadmissible, and WCOG never assigned error to this ruling on appeal.[8] CP 357.

Even should this Court accept *arguendo* that Lindquist had a conflict of interest, WCOG has never cited any legal authority holding that work product protections are destroyed when a conflict of interest arises. The trial court specifically noted this lack of authority. CP 427. There is no dispute that Prosecutor Lindquist was one of the County's attorneys in *Nissen*.[9] Both Washington law and the Rules of Professional Conduct expressly prohibit a lawyer from revealing client confidences, even after the attorney-client relationship is terminated. RPC 1.9 (c)(2); RCW 5.60.060; Restatement (Third) of the Law Governing Lawyers § 77, cmt. b. (2000) ("The attorney-client privilege continues indefinitely"); *see also* ABA Formal Opinion 94-385 (either lawyer or client may invoke work product,

[8] "The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." RAP 10.3(g). Where a party fails to assign error to the trial court's decision to strike a declaration, the ruling is not reviewable on appeal. *Workman v. Klinkenburg*, 6 Wn. App.2d 291, 303-04, 430 P.3d 716 (2018).

[9] RCW 36.27.020; *Kleven v. King County Prosecutor*, 112 Wn. App. 18, 25, 53 P.3d 516 (2002) ("[B]y statute, the prosecuting attorney is the legal advisor for all county officers and agencies."); *Harter v. King County*, 11 Wn.2d 584, 595, 119 P.2d 919 (1941) ("[W]here the board [of county commissioners] remains silent, it is bound by the bona fide representation of the county by the prosecuting attorney, who derives his primary authority, not from the board, but from the statutes.").

and lawyer is obligated to do so on behalf of former client). Thus, the Court of Appeals properly held WCOG's conflict of interest argument is factually and legally baseless.

The Court of Appeals correctly applied this Court's holding in *Allphin*, which makes clear that the court's focus is on the conduct of the defendant agency when determining whether the agency has waived work product protection in a document by disclosing it to a third person: "a party waives its work product protection when it discloses work product documents to a third party in a manner creating a significant likelihood that an adversary will obtain the information." *Allphin,* 190 Wn.2d at 700 (emphasis added). As the Court of Appeals here reasoned, when a party shares work product with other parties who are aligned with it in ongoing litigation, there is no waiver: "Because the County, Lindquist, and the amicus groups were similarly aligned on a matter of common interest in the *Nissen* litigation, the County had a reasonable expectation of confidentiality in sharing its work product with the amicus groups and Lindquist." Unpublished Opinion at 13. Thus, again, there is no conflict.

WCOG makes the misleading assertion that besides being shared with Lindquist, WAPA, WSAMA, and Public Employees, "the County's records were also shared with dozens of cities and counties." Petition at 16.

While WAPA and/or WSAMA may have shared briefing with the attorneys representing "dozens of cities and counties" who are the constituent members of those organizations, the record shows the County shared records only with the attorneys representing Lindquist and its amicus supporters in the *Nissen* case. Again, the focus under *Allphin* is the conduct of the County in disclosing its work product to a third person and whether it had a reasonable expectation of confidentiality. Here, where the County's disclosure was only to attorneys representing other parties in *Nissen* who were aligned with it, there was no waiver. The fact that WCOG managed to obtain some of the County's work product records from sources other than the County, long after making the subject PRA request, is immaterial. *See, e.g.*, *Koenig v. Pierce County*, 151 Wn. App. 221, 236, 211 P.3d 423 (2009), as amended (July 20, 2009), as amended on denial of reconsideration (Oct. 26, 2009), review denied, 168 Wn.2d 1023, 228 P.3d 18 (2010)("the fortuity of receiving an exemption log from the prosecutor's office in 2007 does not provide Koenig with a cause of action for its failure to provide him with an exemption log in 2005 when he first requested documents.").

The Court of Appeals also appropriately rejected WCOG's specious argument that an e-mail written by Pamela Loginsky, who represented WAPA in *Nissen*, put the County on notice that any work product it shared

with WAPA would be waived. Opinion, p. 10, fn. 5. Nothing in Ms. Loginsky's e-mail suggests a waiver of work product. The fact that she reminded WAPA's constituent member attorneys that their communications about the *Nissen* briefing would be "public records" has no bearing on whether those communications would be public records that were exempt work product. The County has never claimed its work product records in *Nissen* were not "public records" as broadly defined in the PRA. RCW 42.56.010 (3). It identified them as such on its extensive exemption logs. Rather, the County has consistently claimed that work product contained within these public records is exempt from disclosure.

In sum, the Court of Appeals was correct to hold the County properly claimed records reflecting its attorneys' litigation strategy, mental impressions, and legal opinions in *Nissen* were exempt work product. The court's opinion carefully followed the analysis set forth by this Court in *Allphin* to conclude the County did not commit a waiver. Thus, even if the Court looks past WCOG's failure to show any conflict between the Court of Appeals' opinion and a prior decision of this Court, WCOG's contention that the Court of Appeals erred is baseless.

C. The Court of Appeals' Conclusion that the County's Exemption Logs Satisfied the PRA is Consistent With this Court's Prior Holdings

Last, the Court of Appeals properly affirmed the trial court's determination that the County's exemption logs were adequate. Despite WCOG's assertion, it again shows no conflict between the Court of Appeals' opinion and this Court's prior decisions in *Sanders v. State*, 169 Wn.2d 827, 853, 240 P.3d 120 (2010), or *Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d (2014).

When an agency withholds or redacts a record, the PRA merely requires the agency to "include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record wittheld." RCW 42.56.210 (3)(emphasis added). The purpose of this "brief explanation" requirement is to inform a requestor why a record is being withheld and to allow for meaningful judicial review. *Lakewood*, 182 Wn.2d at 94.

Again, the exemption at issue is work product, which includes both factual information that is collected or gathered by an attorney in anticipation of litigation and an attorney's legal research, theories, opinions, and conclusions. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 605-06, 963 P.2d 869 (1998). Mindful of this nuance, the County's logs provided specific explanations as to what type of work product each exempt record included.

CP 571-632.[10] The County's logs also identified each record's author and recipient and a description of the record, unless this information was clear on the face of the record itself (i.e., redacted copies of e-mails which showed this information). *Id.*

Once again, in the trial court WCOG did not identify specific log entries it was challenging, but it argued in a general fashion that the County was required to explicitly invoke the common interest doctrine in connection with any work product exemptions it was claiming in documents that had been shared with Lindquist, WAPA, WSAMA, and/or Public Employees. Further, WCOG asserted the County was required to state in its exemption "(i) that a common interest agreement was made, (ii) the nature of the common interest and the scope of the agreement, and (iii) the identity of other parties to the agreement." CP 2019. The lower courts correctly rejected this contention.

As explained above, non-waiver is not an element of work product or any other privilege or exemption. The brief explanation requirement therefor does not require a party to affirmatively state that a privilege or exemption has not been waived. If waiver is asserted, *Allphin* holds that waiver of work product does not occur unless a party discloses it "to a third

[10] An excerpt from the County's exemption logs is attached as **Appendix C**.

party in a manner creating a significant likelihood that an adversary will obtain the information." *Allphin,* 190 Wn.2d at 700. While the parties in *Allphin* were aligned such that they could properly be characterized as having a common interest, this Court's opinion did not invoke the common interest doctrine in its analysis whatsoever. WCOG's claim that the County was required to invoke the doctrine to explain the exemption is thus misguided.

Even if the common interest doctrine were needed to explain the non-waiver of work product here, the County was not required to provide the detailed information in its exemption logs claimed by WCOG. The common interest doctrine is not an independent privilege, but is instead "merely an exception to waiver of privilege." *Sanders*, 169 Wn.2d at 853. Consistent with this Court's reasoning in *Sanders*, in the unpublished portion of the Court of Appeals' decision in *Allphin*, it rejected the precise argument being made by WCOG here.[11] Because *Sanders* recognizes that

[11] "Given that the common interest doctrine is merely a common law exception to waiver and not a separate exemption, the County's explanation that the e-mails were 'work product' was sufficient to explain why the County was withholding them. Between this explanation and the County's description of each e-mail's contents, we conclude the County's exemption logs were adequate." *Kittitas County v. Allphin*, 2016 Wash. App. LEXIS 1895, ***28-29 (2016)(unpublished decision, *see* GR 14.1(a)). For the Court's reference, a copy of both the published and unpublished portions of the Court of Appeals' opinion in *Allphin* is attached as **Appendix D**.

the common interest doctrine is an exception to waiver and not an exemption, it supports the County's position, not that of WCOG.

WCOG's assertion that the Court of Appeals' decision conflicts with *Lakewood* is also wrong. In *Lakewood*, this Court addressed the adequacy of a city's exemption logs where it redacted drivers' license numbers and dates of birth from certain police records. *Lakewood*, 182 Wn.2d at 96-97. *Lakewood* did not involve the common interest doctrine, the work product doctrine, or any claim that a privilege or exemption had been waived. As a general proposition, *Lakewood* held the inquiry the court makes in determining whether the brief explanation requirement is satisfied is not whether the agency has provided a correct response to a records request, but "whether it provided sufficient explanatory information for requestors to determine whether the exemptions were properly invoked." *Id*. at 97.

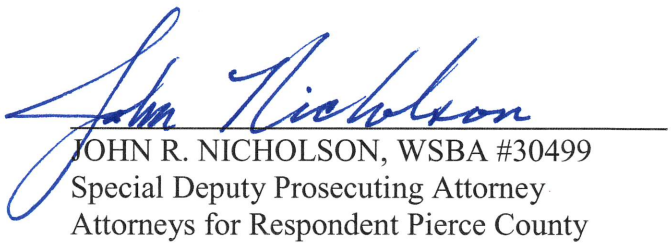
Here, the County's exemption logs explained how each record withheld or redacted was work product. As evidenced by its arguments in this litigation, WCOG had sufficient information to challenge the County's exemption as incorrect based upon a claim of waiver. This is the only brief explanation required by the PRA. RCW 42.56.210 (3). Accordingly, there also is no conflict between *Lakewood* and the Court of Appeals' decision.

IV. CONCLUSION

The unpublished decision of the Court of Appeals is consistent with prior case law of this Court and all divisions of the Court of Appeals. Because WCOG has failed to satisfy the criteria of RAP 13.4 (b), the Court should deny its petition.

RESPECTFULLY SUBMITTED this 3rd day of May, 2019.

FREIMUND JACKSON & TARDIF, PLLC



JOHN R. NICHOLSON, WSBA #30499
Special Deputy Prosecuting Attorney
Attorneys for Respondent Pierce County

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

That on May 3, 2019, I served the foregoing Answer to Petition for Review on the parties to this action as follows:

Attorneys for WCOG William John Crittenden Attorney at Law 12345 Lake City Way NE 306 Seattle, WA 98125-5401 bill@billcrittenden.com	☒ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☒ E-Mail ☐ Legal Messenger

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

DATED this 3rd day of May, 2019, at Olympia, Washington.

Kathi Sisson

KATHRINE SISSON, Legal Assistant

Appendix A

Filed
Washington State
Court of Appeals
Division Two

February 20, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WASHINGTON COALITION FOR OPEN GOVERNMENT, Appellant, v. PIERCE COUNTY, Respondent.	No. 50718-8-II UNPUBLISHED OPINION

LEE, J. — The Washington Coalition for Open Government (WCOG) appeals the superior court's order dismissing its Public Records Act (PRA) claim against Pierce County. WCOG argues that the County improperly redacted hundreds of responsive documents that were not exempt from disclosure under the PRA. WCOG also challenges the adequacy of the County's exemption logs and claims that the County violated the PRA by not providing for electronic transmittal of the requested documents.

We hold that the County met its burden of establishing that the work product privilege exemption applied to the redacted documents. We also hold that the County's exemption logs were adequate and that the County did not violate the PRA by refusing to transmit the requested documents electronically. Because we hold that the County did not violate the PRA, we affirm.

FACTS

A. THE *NISSEN* LITIGATION

In 2011, Glenda Nissen, a Pierce County Sheriff's detective, filed a complaint against Pierce County for disclosure of public records. Her request sought records that Pierce County Prosecutor Mark Lindquist had generated on his private cell phone.

The *Nissen* case was eventually heard by the Washington Supreme Court. *Nissen v. Pierce County*, 183 Wn.2d 863, 888, 357 P.3d 45 (2015). There, the County argued that Lindquist's private cell phone records were exempt from disclosure under the PRA. Several organizations appeared as amicus curiae on behalf of the County, including the Washington Association of Prosecuting Attorneys (WAPA) and the Washington State Association of Municipal Attorneys (WAMA). Like the County, WAPA and WAMA argued that Lindquist's private cell phone records were outside the scope of the PRA. Lindquist also personally intervened in the *Nissen* case. Lindquist argued that disclosure of his private cell phone records would constitute an unlawful search and seizure of his personal property.

Our Supreme Court rejected these arguments. *Id.* The court held that the records an agency employee prepares, owns, uses, or retains on a private cell phone within the scope of employment can constitute public records under the PRA. *Id.*

B. WCOG'S PRA REQUEST

WCOG appeared as an amici curiae and supported Nissen's position in the *Nissen* case. *Id.* at 868. While the *Nissen* litigation was still pending before the Washington Supreme Court, WCOG sent the County a request for public records in April 2015. WCOG requested the following:

> (a) All correspondence, including email, between the County and Mr. Lindquist, other agencies, other public officials, and/or amicus organizations relating to the Glenda Nissen v. Pierce County litigation;
>
> (b) All records discussing the conflict of interest between the County and Mr. Lindquist in the Glenda Nissen v. Pierce County litigation, including any waiver or other resolution of such conflict;
>
> (c) All records, including correspondence, agreements and invoices, relating to the retention of any private attorneys to represent Pierce County in the Glenda Nissen v. Pierce County litigation; and
>
> (d) All records of litigation decisions being made for Pierce County as the defendant in the Glenda Nissen v. Pierce County litigation, specifically including but not limited to, records indicating which person(s) are making litigation decisions for the County in the Glenda Nissen v. Pierce County litigation in light of Mr. Lindquist's status as a separate party to that litigation.

Clerk's Papers (CP) at 2645.

WCOG "insist[ed]" that the County respond to its request either by email or internet transfer service. CP at 2646. WCOG instructed the County: "**DO NOT SEND ME CORRESPONDENCE OR RECORDS BY SNAIL MAIL.**" CP at 2646 (emphasis in original).

The County sent WCOG a responsive letter by regular mail on April 8. In its letter, the County explained that it did not release responsive public records "through untried or potentially unreliable internet transfer services." CP at 2648. The County also explained that it would not communicate through email "because there [was] no guarantee of timely receipt of emails from external senders due to multiple spam filters" outside its control. CP at 2648. The County estimated that the first installment of responsive records would be available to WCOG in four weeks.

On April 17, WCOG emailed the County and objected to its refusal to correspond through email. WCOG emailed the County two days later and expanded its request to include:

> (e) All records, including correspondence, email, notes, drafts and word processing files, relating in any way to the amicus briefs filed by the Pierce County Prosecuting Attorneys' Association in the Glenda Nissen v. Pierce County litigation.

CP at 2651.

The County responded to WCOG's expanded records request by a letter dated April 24. The County informed WCOG that it had expanded the records search per WCOG's request and it estimated that the first installment would be available on May 6.

On April 27, WCOG emailed the County and again objected to communication by regular mail, rather than email. WCOG instructed the County to notify WCOG by email "when at least the portion of the records" identified in its April 17 letter would be provided. CP at 2655.

The County responded by regular mail on May 5. The County informed WCOG that it required an additional three days to provide the responsive records due to "unforeseen circumstances, to include multiple communications to and from [WCOG]." CP at 2657.

On May 11, the County informed WCOG by regular mail that the first installment of records was available. The County identified 533 pages responsive to WCOG's request, but informed WCOG that "a good number of these pages" had been fully redacted. CP at 2659. The County informed WCOG that the cost for copying and delivering the records was $88.65. The County offered to omit the fully redacted pages from release and to recalculate the cost excluding the redacted pages. The County also provided an exemption log explaining that the redacted pages were exempt as work product. The brief explanation for each of the redacted pages stated:

> RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash. App. 221 (2009) | Work Product – Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.
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> RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product Document | Redacted or exempted material within prosecutor's file are documents gathered by an attorney and legal staff in anticipation of actual litigation in State v. Glenda Nissen v. Pierce County, Thurston County Superior Court No. 11-2-02312-2, Washington Supreme Court 908753 and 871876, Court of Appeals II 448521.

CP at 2660-63.

WCOG responded by email on May 14. WCOG claimed that the exemptions were improper because they did not contain adequate description of the claimed exemption. The County did not respond to WCOG's email. On July 1, WCOG sent the County an email notifying the County that it would be sending a check for $88.65 "under protest." CP at 2665.

On July 9, the County sent WCOG another letter by regular mail. The letter explained that the County had sent WCOG the 72 pages that had not been fully redacted. The County returned WCOG's check and informed WCOG that it would send the 461 pages of fully redacted records upon request. WCOG requested the remaining 461 pages by email on July 15.

On August 10, the County informed WCOG by regular mail that the second installment of responsive records was ready. The County also included an exemption log for this installment, which identified hundreds of pages of responsive records as work product. The exemption logs contained the following brief explanations:

> RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product – Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.

. . . .

> RCW 42.56.290, CR 26, Sanders v. State of Washington, 169 W. 2d 827 (2010) | Work Product Document – Common interest | Redacted or exempted material in prosecutor records contain confidential communications from multiple parties pertaining to their common claim or defense, these communications remain privileged as to those outside their group.
>
> . . . .
>
> RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product Document | Redacted or exempted material within prosecutor's file are documents gathered by an attorney and legal staff in anticipation of actual litigation in State v. Glenda Nissen v. Pierce County, Thurston County Superior Court No. 11-2-02312-2, Washington Supreme Court 908753 and 871876, Court of Appeals II 448521.

CP at 2674.

WCOG responded by email on August 13. WCOG claimed that the County's brief explanation was inadequate because the County could not claim work product for communications with other parties and amicus groups in the *Nissen* litigation.

The County responded to WCOG's email by letter dated August 20. In its letter, the County called WCOG's August 13 email "factually and legally baseless." CP at 2679.

WCOG attempted to email the County on August 31. However, the County's public records officer had retired, and her email account was deactivated. WCOG re-sent its August 31 email to another County employee on October 19, who forwarded the email to the County's new public records officer that day. The County informed WCOG that the error evidenced why email is not always the best way to ensure a party receives communication.

WCOG sent the County a letter by email on October 19. WCOG's letter detailed the history of its PRA request, including its communication with the County. WCOG again challenged

the adequacy of the County's exemption logs, and WCOG again claimed that the County had violated the PRA by refusing to communicate through email.

The County responded by regular mail on October 23. The County offered to scan the paper documents and copy them to a CD at a cost of $.84 per minute. The CD would then be sent to WCOG by regular mail. WCOG declined this offer by email on November 19.

The County notified WCOG by regular mail on December 2 that information regarding the third installment would be ready in two weeks. Again, the County offered to provide the responsive records in the second installment by CD. WCOG sent the County a check to receive the second installment by CD, which the County provided.

On December 14, WCOG filed a complaint for violations of the PRA. WCOG alleged that the County had (1) improperly withheld records subject to disclosure, (2) failed to provide a brief explanation explaining how the County's claimed exemption applied to the redacted records, and (3) violated its duty to provide the " 'fullest assistance' " when it refused to communicate with WCOG through email. CP at 2709. WCOG claimed that the records were improperly withheld because the County waived its work product privilege when it shared the documents with Lindquist and the amicus groups involved in the *Nissen* litigation.

After WCOG filed its complaint, the County continued to send WCOG's installments of responsive records. The County released the sixth installment on May 13, 2016. At that time, the County informed WCOG that it had changed its policy on the use of internet transfer services and began providing the responsive records electronically.

In June, the superior court issued a ruling in favor of the County on the merits of WCOG's PRA complaint. The superior court ruled that the County did not violate the PRA by refusing to

allow electronic transmittal of documents. The superior court further ruled that the County had not waived its work product privilege by disclosing the requested documents to Lindquist and the amicus groups. And the superior court ruled that the County's brief explanation of the work product exemption in its exemption logs was adequate under the PRA.

WCOG appeals.

ANALYSIS

A. STANDARD OF REVIEW

We review de novo agency action taken or challenged under the PRA. RCW 42.56.550(3)[1]; *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 428, 327 P.3d 600 (2013). An agency bears the burden of establishing that an exemption to production applies under the PRA.[2] *Id.*.

[1] RCW 42.56.550 has been amended since the events of this case transpired. However, the amendments do not materially affect the statutory language relied on by this court. Accordingly, we refrain from including "former" before RCW 42.56.550.

[2] WCOG claims that the superior court improperly shifted the burden of proof in its ruling. However, WCOG acknowledges that the superior court's ruling is "immaterial" because this court's review is de novo. Br. of Appellant 23. Therefore, we do not consider this alleged error.

B. WAIVER OF WORK PRODUCT PROTECTION[3]

In response to WCOG's PRA request, the County claimed that hundreds of drafts, draft pleadings, handwritten notes, legal research, and correspondence related to the *Nissen* litigation were exempt from production as work product. As such, the County redacted these communications and documents either in part or in full in its response to WCOG's PRA request. WCOG argues that these documents were improperly redacted because the County waived its work product protection when it shared the documents with various amicus groups and Lindquist, who had personally intervened in the *Nissen* case. We disagree.

"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). Under the PRA, an agency must disclose responsive public records "unless the record falls within the specific exemptions of [the PRA] . . . or other statute." RCW 42.56.070(1).[4] "[C]ommonly referred to as the 'controversy exception,' " RCW 42.56.290 exempts records from disclosure under the PRA if they " 'would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.' " *Kittitas County v. Allphin*, 190 Wn.2d 691,

[3] The County argues that WCOG's lawsuit was premature under *Hobbs v. Washington State Auditor's Office*, 183 Wn. App. 925, 335 P.3d 1004 (2014). WCOG and the County filed competing motions for summary judgment on this issue below. The superior court granted WCOG's motion for partial summary judgment on standing and denied the County's motion for summary judgment based on *Hobbs*. The County never appealed this order. The County also never filed a cross-appeal in this case. Therefore, we do not consider the County's argument based on *Hobbs*.

[4] RCW 42.56.070 has been amended since the events of this case transpired. However, the amendments do not materially affect the statutory relied on by this court. Accordingly, we refrain from including the word "former" before RCW 42.56.070.

701, 416 P.3d 1232 (2018) (quoting RCW 42.56.290) (citing *Soter v.Cowles Publ'g Co.,* 162 Wn.2d 716, 732, 174 P.3d 60 (2007) (plurality opinion)).

Here, the County claimed that hundreds of redacted documents qualified as work product under CR 26(b)(4), and, therefore, were exempt from disclosure under the controversy exception of RCW 42.56.290. The work product doctrine "protect[s] against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." CR 26(b)(4). Thus, the doctrine only applies to materials prepared in anticipation of completed, existing, or reasonably anticipated litigation. *Allphin*, 190 Wn.2d at 704. "When creating work product in anticipation of litigation, 'there is no distinction between attorney and nonattorney work product.' " *Id.* (quoting *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985)).

WCOG argues that the County waived its work product protection in these documents when it shared them with third parties.[5] WCOG does not identify every document it believes the County improperly redacted, but instead, identifies "examples" of documents it believes that the County improperly redacted.[6] Br. of Appellant at 26. And WCOG appears to argue, based on

[5] At oral argument, WCOG argued that the County knew that it was waiving the work product privilege because it had received an email from Pam Loginski stating that sharing the documents would waive any privilege. Wash. Court of Appeals oral argument, *Washington Coalition for Open Government v. Pierce County*, No. 50718-8-II (Jan. 10, 2019), at 2 min., 55 sec. to 3 min., 20 sec. (on file with court). The record fails to support WCOG's argument. The record contains an email from Pam Loginski to her client, WAPA member attorneys, discussing her *Nissen* brief and reminding the WAPA member attorneys that their responses to her email are public records.

[6] WCOG assigns error to the superior court's conclusion that WCOG had failed to identify specific records that it believed had lost their work product privilege because they were shared. However, even WCOG admits that it merely provided "examples" of the records it believed the County had

these examples, that the County waived its work product protection in every document that it shared with Lindquist and the amicus groups in the *Nissen* litigation.

WCOG's argument confuses waiver under the work product doctrine with waiver of attorney-client privilege. WCOG narrowly focuses its argument on the applicability of the common interest doctrine, an exception to the general rule that voluntary disclosure of privileged attorney-client or work product communications to a third party waives privilege. But WCOG fails to distinguish between waiver of work product privilege and attorney-client privilege, and it fails to analyze whether the County waived its work product privilege to begin with.

" '[W]hile the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege.' " *Allphin*, 190 Wn.2d at 710 (quoting *Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299). A party only waives its work product privilege when " 'the client, the client's lawyer, or another authorized agent of the client . . . discloses the material to third persons in circumstances in which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it.' " *Id.* at 708 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 91(4) (AM. LAW INST. 2000)). The work product doctrine protects the efforts of an attorney, and those who assist that attorney, from disclosure to a litigation adversary. *Id* at 709. The attorney-client privilege, by contrast, safeguards confidentiality of communications between an attorney and client. *Id.*

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improperly redacted. Br. of Appellant at 26. Because our review is de novo, we need not review the factual and legal conclusions of the superior court.

The work product doctrine allows parties to share work product in certain contexts without waiving the accompanying protections of the work product doctrine. *Id.* at 712. "A party can share work product with coparties and others who are similarly aligned on a matter of common interests because such parties are unlikely to disclose work product to adversaries." *Id.*

WCOG fails to show that the County's disclosure of work product to the amicus groups in the *Nissen* litigation created a significant likelihood that an adversary or potential adversary in the *Nissen* case would obtain these documents. Instead, WCOG relies on *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012), to argue that a shared desire for the same outcome in a legal matter was insufficient to create a common interest agreement between the County, Lindquist, and the amicus groups in the *Nissen* litigation.

In *Pacific Pictures*, the court stated that a shared desire to see the same outcome in a legal matter is not sufficient for communication between two parties to fall under the "common interest" or "joint defense" exception to waiver of attorney client privilege. 679 F.3d at 1129 (explaining that the common interest or joint defense rule is an exception to the ordinary waiver rules designed to allow attorneys representing different clients in pursuit of common legal strategies to communicate with one another). Thus, *Pacific Pictures* is inapplicable because that case involved waiver of the attorney-client privilege, not the work product doctrine.

WCOG also relies on the absence of a formal agreement between the County, Lindquist and the amicus groups to argue that the County waived its work product protections. However, parties do not need a written agreement to maintain confidentiality in order for the work product protection to apply. *Allphin*, 190 Wn.2d at 713. "Instead, a reasonable expectation of

confidentiality may derive from common litigation interests between the disclosing party and the recipient." *Id.*

The record shows that the County disclosed its work product to Lindquist, WAPA, and the WAMA and that they all shared a common litigation interest with the County. Like the County, Lindquist and the amicus groups argued that text messages on Lindquist's private cellphone were not subject to disclosure under the PRA. Because the County, Lindquist, and the amicus groups were similarly aligned on a matter of common interest in the *Nissen* litigation, the County had a reasonable expectation of confidentiality in sharing its work product with the amicus groups and Lindquist. WCOG fails to show that disclosure of work product to similarly aligned amicus groups created a significant likelihood that the County's adversary (Nissen) would obtain these documents.

WCOG also argues that the County waived its work product privilege by disclosing certain documents to Lindquist because Lindquist personally intervened in the *Nissen* litigation. However, WCOG fails to acknowledge that Lindquist and the County shared common litigation interests in *Nissen*, as both argued that records on Lindquist's private cellphone were not subject to PRA disclosure. And WCOG provides no authority to support its assertion that Lindquist became an adverse party to the County simply because he personally intervened in the *Nissen* litigation. WCOG similarly fails to provide any support for its claim that Lindquist and the County were adversaries in the *Nissen* litigation because they had a conflict of interest.

Thus, the County did not waive its work product protection by sharing the redacted documents with the amicus groups and Lindquist in the *Nissen* litigation. The County's claimed

exemptions were proper under RCW 42.56.290 and CR 26(b)(4), and it did not violate the PRA by redacting the exempt records.[7]

C. ADEQUACY OF EXEMPTION LOGS

Next, WCOG argues that the County's exemption logs failed to provide the brief explanation of how the work product exemption applied to the redacted records. We disagree.

When an agency withholds or redacts records subject to a PRA disclosure, its response "shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." RCW 42.56.210(3). The purpose of the brief explanation requirement is to inform the requestor why a document is being withheld and to provide for meaningful judicial review. *Koenig*, 182 Wn.2d at 94. Thus, under RCW 42.56.210(3), an agency must identify " 'with particularity' the specific record or information being withheld and the specific exemption authorizing the withholding." *Id.* (internal quotation marks omitted) (quoting *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 538, 199 P.3d 393 (2009)). Merely specifying the claimed exemption and identifying the withheld document's author, recipient, date of creation, and broad subject matter is insufficient. *See Sanders v. State*, 169 Wn.2d 827, 846, 240 P.3d 120 (2010) (holding that identification of the document and the claimed exemption does not constitute a brief explanation under RCW 42.56.210(3)).

[7] WCOG also asks that we rule, in the alternative, that a party may not claim that records are exempt from disclosure under the PRA when one party is also the attorney for an adverse party in the same case. WCOG provides no case law to support this argument. Also, as explained above, nothing in the record shows that Lindquist was an adverse party to the County in this case.

Contrary to WCOG's claim, the County's exemption logs did not merely assert that the redacted records were work product. The County also provided a brief explanation that certain records constituted work product because they contained mental impressions, legal opinions, and legal researched generated by or for an attorney in the *Nissen* litigation. Some of the exemption logs also explained that the redacted materials were shared with other parties based on a common claim or defense in the *Nissen* litigation. The County provided WCOG with the following brief explanations in its exemption logs:

> RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.
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> RCW 42.56.290, CR 26, Sanders v. State of Washington, 169 W. 2d 827 (2010) | Work Product Document – Common interest | Redacted or exempted material in prosecutor records contain confidential communications from multiple parties pertaining to their common claim or defense, these communications remain privileged as to those outside their group.
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> . . . .
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Court No. 11-2-02312-2, Washington Supreme Court 908753 and 871876, Court of Appeals II 448521.

CP at 2660-63, 2674

Nonetheless, WCOG argues that under *Sanders*, the County was required to (1) explain in writing that it had made a common interest agreement with the other parties in the *Nissen* litigation, (2) identify the scope of that agreement, and (3) identify all other parties to that common interest agreement. *Sanders* imposes no such requirements.

In *Sanders*, our Supreme Court held that merely identifying a document and the claimed exemption did not constitute a "brief explanation" under RCW 42.56.210(3). 169 Wn.2d at 846. An agency withholding or redacting records under RCW 42.56.210(3) must "specify the exemption *and* give a brief explanation of how the exemption applies to the document." *Id.* (emphasis in original). However, the *Sanders* court explained that the common interest doctrine is not one of the enumerated PRA exemptions. *Id.* at 853. It "is merely an exception to waiver." *Id.* at 854. Because the common interest doctrine is not one of the enumerated PRA exemptions, the County was not required to specify in the detail WCOG argues as to how the common interest doctrine applied to the redacted records in its brief explanation under RCW 42.56.210(3). *See Id.* at 853.

Also, even if such a detailed explanation is required when an agency waives its work product privilege, as explained above, the County did not waive its work product privilege by sharing the redacted documents with Lindquist and the amicus parties. Thus, we hold that the County did not violate the PRA by failing to explain in detail in its exemption logs how an exception to the waiver of a claimed exemption applied to the redacted records.

D. FAILURE TO PRODUCE ELECTRONIC RECORDS

WCOG also argues that the County violated the PRA because it failed to adopt and enforce rules allowing for electronic dissemination of public records.[8] WCOG also claims that the County violated the PRA by communicating with WCOG through regular mail, rather than by email. We disagree.

Under RCW 42.56.100 "[a]gencies shall adopt and enforce reasonable rules and regulations . . . consonant with the intent of this chapter to provide full public access to public records . . . Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." However, "[n]othing in the PRA obligates an agency to disclose records electronically." *Mitchell v. Washington State Dep't of Corr.*, 164 Wn. App. 597, 606, 277 P.3d 670 (2011). WCOG cites no authority to the contrary. WCOG also cites to no authority holding that an agency must communicate through email upon request.

Instead, WCOG relies on WAC 44-14-05001, model rules promulgated by the Attorney General for processing electronic records requests. Under the model rules, "an agency should provide electronic records in an electronic format if requested in that format, if it is reasonable and feasible to do so." WAC 44-14-05001. While the model rules provide useful guidance to agencies, they are not binding. *Mitchell*, 164 Wn. App. at 606; *Mechling v. City of Monroe*, 152 Wn. App.

[8] At oral argument, WCOG expanded its argument by claiming the County failed to adopt *any* rules for responding to PRA requests. Wash. Court of Appeals oral argument, *supra*, at 11 min., 55 sec. to 12 min., 16 sec. However, in its briefing, WCOG references the "County's 2007 rules," which required requestors to provide an email address. Br. of Appellant at 47. Thus, WCOG's own briefing undermines its attempt to broaden its claim during oral argument that the County failed to adopt *any* rules for responding to PRA requests.

830, 849, 222 P.3d 808 (2009), *review denied*, 169 Wn.2d 1007 (2010). Thus, WCOG fails to show that the County violated the PRA when it failed to adopt the model rules promulgated by the Attorney General.

E. ATTORNEY FEES

WCOG requests attorney fees if it prevails on appeal under RAP 18.1. Br. of Appellant at 50. Because WCOG does not prevail on appeal, we decline to impose attorney fees.

CONCLUSION

We hold that the County met its burden of establishing that the work product privilege exemption applied to the redacted documents. We also hold that the County's exemption logs were adequate and that the County did not violate the PRA by refusing to transmit the requested documents electronically. Because we hold that the County did not violate the PRA, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Johanson, J.

Maxa, C.J.

Appendix B

Superior Court of the State of Washington
For Thurston County

2000 Lakeridge Drive SW • Building Two • Olympia WA 98502
Telephone: (360) 786-5560 **Website:** www.co.thurston.wa.us/superior

June 15, 2017

William J. Crittenden
Attorney at Law
12345 Lake City Way NE
Seattle, WA 98125-5401

Michael E. Tardif
Freimund Jackson & Tardif PLLC
711 Capitol Way S, Ste. 602
Olympia, WA 98501-1236

John R. Nicholson
Freimund Jackson & Tardif PLLC
701 5th Ave, Ste. 3545
Seattle, WA 98104-7097

COURT'S LETTER RULING

RE: *Washington Coalition for Open Government v. Pierce County*
Thurston County Cause No. 16-2-01006-34

Dear Counsel:

This matter came before the Court for a merits hearing set by the Court for April 21, 2017.

The Court considered oral argument and the pleadings, including the declarations and exhibits on file. The hearing was based on affidavits as allowed by RCW 42.56.550(3). At the merits hearing, the Court considered several issues, including:

(1) whether to sustain evidentiary objections regarding some of Plaintiff's declarations;
(2) whether the duty to offer "fullest assistance" was violated because the first installments were produced by mail and not electronically and because there is not an agency policy providing for electronic submissions;
(3) whether the exemptions cited by Pierce County were applicable; and
(4) whether the exemption logs were inadequate based upon the argument that the description lacked specificity.

The Court now issues a decision in favor of Pierce County on the merits.

1. Evidentiary Objections to the Plaintiff's Declarations

As a threshold matter, Pierce County challenges the admissibility of declarations by attorneys Arthur Lackman and James Smith, and to numerous exhibits that allegedly are based on lack of relevance and hearsay. Regarding the attorney declarations, this Court holds that they contain improper expert testimony on legal conclusions. This Court will not consider such expert opinions contained within the declarations. *Bell v. State*, 147 Wn.2d 166, 179 (2002) (holding that expert testimony on legal issues is not admissible).

Regarding the objections to the exhibits, the Court has reviewed the exhibits and they are not stricken. Pierce County's objection was too broad and unspecific for this Court meaningfully to apply, consisting of a two-sentence objection to 28 documents. However, this Court is aware of the rules of evidence and has considered all of the declarations and exhibits in light of admissibility standards and the Court's ruling above.

2. Duty of Fullest Assistance

The Plaintiff argues that Pierce County violated the Public Records Act (PRA) by not having a policy to allow electronic transmittal of documents and by not, in fact, providing electronic documents. The facts regarding this argument are essentially uncontested. The Court does not find the Plaintiff's argument persuasive.
Under RCW 42.56.100:

> Agencies shall adopt and enforce reasonable rules and regulations . . . consonant with the intent of [the PRA] to provide full public access to public records. . . . Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information."

The agency bears the burden of proof under this statute. *Neighborhood Alliance of Spokane Co. v. County of Spokane*, 172 Wn.2d 702, 715 (2011).

In this case, the first installments were provided by mail, but later and ongoing installments are being provided electronically due new technology that Pierce County implemented during its response period. There is no showing here that the Plaintiff was actually denied access to records because they were supplied by mail. This Court finds that the method of supplying records did not violate the PRA.

The parties disagree on whether there is an independent cause of action for a County's failure to adopt rules and regulations under the PRA. Pierce County believes that the only appropriate remedy for such a violation is an injunction, but it cites only an unpublished case for this proposition.

The Plaintiff cites two cases for the proposition that the PRA is violated if an agency does not adopt or enforce rules under RCW 42.56.100 – *Kleven v. Des Moines*, 111 Wn. App. 284, 296-97 (2002); and *ACLU v. Blaine School Dist.*, 86 Wn. App. 688, 695 (1997). Those cases are

inapposite. The record in *Klevin* contained no information to show that the City had not adopted or enforced rules and regulations, and so the Court of Appeals did not address that issue. Further, *ACLU* involves a case in which a school district refused to mail documents to a requestor who was located over 100 miles away. That refusal had a practical effect of making it very difficult or impossible to obtain the responsive documents. That has not been demonstrated here, although some inconvenience and extra expense is alleged.

This Court does not find any authority holding that the PRA is violated based on failure to adopt rules allowing electronic transmittal of responsive documents. This is particularly true under the facts of this case, in which documents are in fact being transmitted electronically now.

Further, the very facts of this case demonstrate why electronic submission of documents under the PRA can be problematic. In the middle of responding to this request, the original records officer retired and another records officer took over the project. The requestor continued to send emails to the first records officer's work email address, which was inactive. The messages did not get to the correct person. Electronic communications regarding PRA requests and responses are not necessarily more reliable or convenient than using the U.S. mail.

3. Applicability of Exemption

The next issue is whether the exemption cited is legally appropriate. This Court finds that it was.

Pierce County argues that this Court should not address this issue because it is premature to do so. The documents responsive to the request have not all been provided yet, as ongoing responsive batches are forthcoming. In *Hobbs v. State*, the Court of Appeals held that a PRA lawsuit was premature when it was filed after the first installment, but when future installments were still outstanding. 183 Wn. App. 925, 936-37 (2014). In that case, the Court held that there was no "final agency action" because the Plaintiff's request was not denied. This lawsuit is different. Pierce County has denied inspection of multiple records or portions of records and provided exemption logs. The agency takes a clear position that the exemptions are justified and the withheld documents will not be produced. This lawsuit is in response to final agency action, and it is not premature.

This Court is not addressing any agency action or decisions made regarding installments produced after the initiation of this litigation.

The agency bears the burden "to establish that refusal to permit public inspection and copying in accordance with a statute that exempts or prohibits disclosure." RCW 42.56.550(1). However, it is the Plaintiff's burden to prove the elements necessary to recovery. *Adams v. Washington State Dept. of Corrections*, 189 Wn. App. 925, 952 (2015).

The issue here is whether the documents are subject to disclosure in light of the attorney work product privilege and the common interest doctrine. Generally, a party waives the attorney work product privilege if that party discloses documents to other persons with the intention that an adversary can see the documents. *Limstrom v. Ladenburg*, 110 Wn. App. 133, 145 (2002).

"The 'common interest' doctrine provides that when multiple parties share confidential communications pertaining to their common claim or defense, the communications remain privileged as to those outside their group." *Sanders v. State*, 169 Wn.2d 827, 853 (2010). "The common interest doctrine is an exception to the general rule that the voluntary disclosure of a privileged attorney client or work product communication to a third party waives the privilege." *Kittitas Co. v. Allphin*, 195 Wn.App. 355, 368 (2016), *review granted in part*, 187 Wn.2d 1001 (2017).

The records at issue in this case are numerous, consisting of over 9,000 pages. Many records were not disclosed, citing the work product privilege. The Plaintiff alleges in a generic way that the work product privilege does not apply because some or all of the documents were shared outside of the attorney-client relationship. Pierce County responds that sharing of any of those documents does not destroy the work product privilege because the common interest doctrine applies.

Specifically, the Plaintiff alleges that giving documents to Lindquist and to the Washington Association of Prosecuting Attorneys and the Washington State Association of Municipal Attorneys, two amici in the *Nissen* litigation,[1] destroyed the work product privilege. Pierce County argues that Lindquist and the associations were acting as joint defendants in the *Nissen* case, which may be implied from conduct. *See Allphin*, 195 Wn. App. at 359 (holding that no formal or written agreement is required for a common interest to arise); *United States v. Gonzales*, 669 F.3d 974, 979 (9th Cir. 2012) (holding that common interest can be implied from conduct and situation).

Pierce County has met its burden to establish that a PRA exemption (work product privilege) applies to these documents. It is not disputed that the work product privilege applies to these documents in a general sense. Further, and significantly, the Plaintiff has failed to even identify which specific records are at issue that purportedly lost their work product privilege because they were shared. Additionally, this Court finds that there was a common interest between Pierce County, its elected Prosecutor Lindquist, and the amici that received the documents in the context of the *Nissen* litigation.

The final argument by the Plaintiff on this issue is that a conflict of interest destroys the common interest doctrine. The Plaintiff explains that no court has made such a legal ruling. This Court declines to issue a new statement of law, especially when the record is insufficiently developed to do so.

4. Adequacy of Exemption Logs

Finally, the Plaintiff asserts that the exemption logs are inadequate because they lack the specificity that Plaintiff asserts is required. This Court holds that they were adequate.

An agency that withholds or redacts a record under the PRA must "include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation

[1] *Nissen v. Pierce County*, Thurston County Superior Court Cause No. 11-2-02312-2; *Nissen v. Pierce County*, 183 Wn.2d 863 (2015).

of how the exemption applies to the record withheld." RCW 42.56.210(3). The Plaintiff takes issue with the specificity of the exemption logs, which state repeatedly:

> RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product – Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.

Defendant's Brief and Declarations, Vol. 2, Ex. 34. The Plaintiff believes that the common interest doctrine should have been specifically invoked in the exemption logs.

The common interest doctrine is part of the attorney-client privilege and the work product privilege. It is merely an exception to the typical rule that those privileges are waived when confidential communications are shared with parties outside of the attorney-client relationship. *Sanders v. State*, 169 Wn.2d 827, 853-54 (2010). The common interest doctrine is not an independent basis to withhold or redact PRA documents. The "exemption relied on" to withhold documents in this case was the work product privilege. That was adequately cited and explained in the redaction logs. Pierce County did not violate its duty.

In short, this Court rules in favor of Pierce County on the merits of this case. The merits hearing did not involve a challenge to any particular document withheld or redacted. In the event that there are issues identified by the parties in their Joint Statement filed on November 17, 2016, that remain unresolved, the Plaintiff shall set a PRA scheduling conference after conferring with Defendant's counsel.

The parties may present an order based on this Court's ruling by scheduling it for presentation on a civil motion calendar.

Sincerely,

Carol Murphy

Carol Murphy
Superior Court Judge

cc: Court File

Appendix C

	A	B	C	D	E	F	G	H	I	J
2	Produced	Produced - Portions Redacted (See Column I)	Not Produced - See Column I	PRR Bates Stamp Page Number	Record Type	Date of Creation (### Denotes Work Product)	Brief Description of Record (### Denotes Work Product)	Author (and recipient if record is a communication) (### Denotes Work Product)	Statute | Description of Exemption | How Exemption Applies to Prosecutor Records	Additional Identification
3					1st Installment					
4		X		1	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
5			X	2-32	Attachment to Page 01	April 2015	Draft	Philip Talmadge Mark Lindquist Dan Hamilton	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
6		X		33	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
7			X	34-61	Attachment to Page 33	April 2015	Draft	Phillip Talmadge Mark Lindquist Dan Hamilton	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
8		X		62	Work Product	February 2014	Draft	Dan Hamilton	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
9			X	63-78	Work Product	February 2015	Draft	Dan Hamilton	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
10		X		79	Work Product	February 2014	Draft	Dan Hamilton	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
11			X	80-99	Work Product	February 2014	Draft	Dan Hamilton	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
12		X		100-101	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
13		X		102	Attachment to Page 100	February 2014	Draft	Stewart Estes	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.

	A	B	C	D	E	F	G	H	I	J
2	Produced	[redacted]	Withheld or Redacted in Full	PRR Bates Stamp Page Number	Record Type	Date of Creation (### Denotes Work Product)	Brief Description of Record (### Denotes Work Product)	Author (and recipient if record is a communication) (### Denotes Work Product)	Statute | Description of Exemption | How Exemption Applies to Prosecutor Records	Additional Identification
14			X	103-120	Attachment to Page 101	February 2015	Draft	Stewart Estes	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
15		X		121	Attachment to Page 100	February 2014	Draft	Mark Lindquist Dan Hamilton	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
16			X	122-135	Attachment to Page 100	February 2014	Draft	Mark Lindquist Dan Hamilton	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
17		X		136	Work Product	February 2014	Draft	Stewart Estes	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
18			X	137-149	Work Product	February 2015	Draft	Stewart Estes	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
19	X			150						
20			X	151-198	Work Product	January 2014	Draft	Philip Talmadge	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
21		X		199	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
22			X	200-237	Attachment to page 199	Unknown	Draft	Unknown	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
23		X		238	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
24			X	239-242	Work Product	September 2013	Draft	Unknown	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
25			X	243-276	Work Product	Unknown	Draft	Unknown	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.

	A	B	C	D	E	F	G	H	I	J
2	Produced	Redacted	Not Produced/Withheld in Entirety	PRR Bates Stamp Page Number	Record Type	Date of Creation (### Denotes Work Product)	Brief Description of Record (### Denotes Work Product)	Author (and recipient if record is a communication) (### Denotes Work Product)	Statute | Description of Exemption | How Exemption Applies to Prosecutor Records	Additional Identification
26		X		277	Work Product	August 2013	Draft	Unknown	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
27			X	278-281	Work Product	August 2013	Draft	Unknown	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
28			X	282-310	Work Product	2013	Draft	Unknown	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
29		X		311-316	Work Product	June 2013	Draft	Michael Patterson	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product Document | Redacted or exempted material within prosecutor's file are documents gathered by an attorney and legal staff in anticipation of actual litigation in State v Glenda Nissen v. Pierce County, Thurston County Superior Court No. 11-2-02312-2, Washington Supreme Court 908753 and 871878, Court of Appeals II 44852I	Applies to redaction code 2.
30	X			319-325						
31		X		326-341	Work Product	May 2013	Draft	Michael Patterson	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
32		X		342-357	Work Product	May 2013	Draft	Michael Patterson	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
33		X		358-419	Work Product	May 2013	Draft	Michael Patterson	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
34		X		420-422	Work Product	May 2013	Draft	Dawn Farina	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
35		X		423	Work Product	June 26, 2014	Draft	Philip Talmadge	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
36			X	424	Work Product	Unknown	Handwritten Notes	Unknown	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.

2	A Produced	B Produced in part (redacted) - See Column I	C Not Produced - See Column I	D PRR Bates Stamp Page Number	E Record Type	F Date of Creation (### Denotes Work Product)	G Brief Description of Record (### Denotes Work Product)	H Author (and recipient if record is a communication) (### Denotes Work Product)	I Statute | Description of Exemption | How Exemption Applies to Prosecutor Records	J Additional Identification
37		X		425	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
38			X	426-440	Attachment to page 425	September 2014	Draft	Dan Hamilton	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
39		X		441	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
40			X	442-466	Attachment to page 441	October 2014	Draft	Philip Talmadge Mark Lindquist Dan Hamilton	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
41		X		467	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
42			X	468-483	Attachment to page 467	2014	Draft	Stewart Estes	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
43		X		484	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
44			X	485-507	Attachment to page 484	2014	Draft	Stewart Estes	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
45		X		508	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
46			X	509-533	Attachment to page 508	October 2014	Draft	Philip Talmadge Mark Lindquist Dan Hamilton	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
47					2nd Installment					

	A	B	C	D	E	F	G	H	I	J
2	Produced	Produced	Not Produced - See Column I	PRR Bates Stamp Page Number	Record Type	Date of Creation (### Denotes Work Product)	Brief Description of Record (### Denotes Work Product)	Author (and recipient if record is a communication) (### Denotes Work Product)	Statute | Description of Exemption | How Exemption Applies to Prosecutor Records	Additional Identification
48		X		534	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
49			X	535-561	Attachment to page 534	09/25/14	Draft Pleading	Philip Talmadge Mark Lindquist Dan Hamilton	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
50		X		562	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
51			X	563-586	Attachment to Page 535	10/2014	Draft Pleading	Stewart Estes Dawn Farina	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
52		X		587	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
53			X	588-611	Attachment to page 587	10/07/14	Draft Pleading	Stewart Estes	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
54			X	612-619	Draft	10/2014	Pleading	Philip A. Talmadge	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
55		X		620-621	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
56			X	622-630	Attachment to page 621	10/17/14 and 10/23/14	Draft Pleading	Dawn Farina Philip A. Talmadge Michael Patterson	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
57		X		631-632	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
58			X	633-641	Attachment to page 630	10/22/14	Draft Pleading	Dawn Farina Philip A. Talmadge Michael Patterson	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.

2	A Produced	B Produced, Portions Redacted (See Column I)	C Not Produced (See Column I)	D PRR Bates Stamp Page Number	E Record Type	F Date of Creation (### Denotes Work Product)	G Brief Description of Record (### Denotes Work Product)	H Author (and recipient if record is a communication) (### Denotes Work Product)	I Statute | Description of Exemption | How Exemption Applies to Prosecutor Records	J Additional Identification
59		X		642	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
60			X	643-649	Attachment to page 642	11/20/14	Draft Pleading	Dawn Farina Philip A. Talmadge Michael Patterson	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
61		X		650	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
62			X	651-657	Attachment to page 650	11/20/14	Draft Pleading	Dawn Farina Philip A. Talmadge Michael Patterson	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
63		X		658	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
64		X		659	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Sanders v. State of Washington, 169 W. 2d 827 (2010) | Work Product Document - Common interest | Redacted or exempted material in prosecutor records contain confidential communications from multiple parties pertaining to their common claim or defense, these communications remain privileged as to those outside their group.	Applies to redaction code 3
65			X	658-660	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Sanders v. State of Washington, 169 W. 2d 827 (2010) | Work Product Document - Common interest | Redacted or exempted material in prosecutor records contain confidential communications from multiple parties pertaining to their common claim or defense, these communications remain privileged as to those outside their group.	Applies to redaction code 3.
66			X	660	Gathered Material	###	###	###	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product Document | Redacted or exempted material within prosecutor's file are documents gathered by an attorney and legal staff in anticipation of actual litigation in State v Glenda Nissen v. Pierce County, Thurston County Superior Court No. 11-2-02312-2, Washington Supreme Court 908753 and 871876, Court of Appeals II 446521	Applies to redaction code 2.
67			X	661-690	Attachment to page 658	12/14	Draft Pleading	Dawn Farina Philip A. Talmadge Mark Lindquist	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
68			X	691-706	Draft	12/14	Pleading	Philip A. Talmadge Mark Lindquist	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.

	A	B	C	D	E	F	G	H	I	J
2	Produced	Redacted	Withheld in Full	PRR Bates Stamp Page Number	Record Type	Date of Creation (### Denotes Work Product)	Brief Description of Record (### Denotes Work Product)	Author (and recipient if record is a communication) (### Denotes Work Product)	Statute | Description of Exemption | How Exemption Applies to Prosecutor Records	Additional Identification
69		X		707	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
70			X	708-722	Attachment to page 707	12/14	Draft Pleading	Philip A. Talmadge Mark Lindquist	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
71			X	723-729	Gathered Material	###	###	###	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product Document | Redacted or exempted material within prosecutor's file are documents gathered by an attorney and legal staff in anticipation of actual litigation in State v Glenda Nissen v. Pierce County, Thurston County Superior Court No. 11-2-02312-2, Washington Supreme Court 908753 and 871676, Court of Appeals II 448521	Applies to redaction code 2.
72			X	730-745	Gathered Material	###	###	###	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product Document | Redacted or exempted material within prosecutor's file are documents gathered by an attorney and legal staff in anticipation of actual litigation in State v Glenda Nissen v. Pierce County, Thurston County Superior Court No. 11-2-02312-2, Washington Supreme Court 908753 and 871676, Court of Appeals II 448521	Applies to redaction code 2.
73			X	746-752	Gathered Material	###	###	###	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product Document | Redacted or exempted material within prosecutor's file are documents gathered by an attorney and legal staff in anticipation of actual litigation in State v Glenda Nissen v. Pierce County, Thurston County Superior Court No. 11-2-02312-2, Washington Supreme Court 908753 and 871676, Court of Appeals II 448521	Applies to redaction code 2.
74			X	753-766	Gathered Material	###	###	###	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product Document | Redacted or exempted material within prosecutor's file are documents gathered by an attorney and legal staff in anticipation of actual litigation in State v Glenda Nissen v. Pierce County, Thurston County Superior Court No. 11-2-02312-2, Washington Supreme Court 908753 and 871676, Court of Appeals II 448521	Applies to redaction code 2.
75					3rd Installment					
76		X		767	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
77			X	768-791	Draft	2015	Pleading	Stewart Estes	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.
78		X		792	See Record	See Record	See Record	See Record	RCW 42.56.290, CR 26, Koenig v. Pierce County, 151 Wash.App. 221(2009) | Work Product - Mental Impressions/legal opinions | Redacted or exempted material in prosecutor file contains mental impressions, legal opinions, legal research generated by or for an attorney.	Applies to redaction code 1.

Appendix D

Kittitas County v. Allphin

Court of Appeals of Washington, Division Three

April 27, 2016, Oral Argument; August 9, 2016, Filed

No. 33241-1-III

Reporter
195 Wn. App. 355 *; 381 P.3d 1202 **; 2016 Wash. App. LEXIS 1895 ***

KITTITAS COUNTY, *Respondent*, v. SKY ALLPHIN ET AL., *Appellants*.

Notice: PUBLISHED IN PART

Subsequent History: Review granted by, in part *Kittitas County v. Allphin, 187 Wn.2d 1001, 386 P.3d 1089, 2017 Wash. LEXIS 38 (Jan. 4, 2017)*

Decision reached on appeal by, Request denied by *Kittitas County v. Allphin, 2 Wn. App. 2d 782, 413 P.3d 22, 2018 Wash. App. LEXIS 544 (Mar. 13, 2018)*

Affirmed by *Kittitas County v. Sky Allphin, 2018 Wash. LEXIS 336 (Wash., May 17, 2018)*

Prior History: [***1] Appeal from Kittitas Superior Court. Docket No: 13-2-00074-4. Judge signing: Honorable Scott R Sparks. Judgment or order under review. Date filed: 02/27/2015.

ABC Holdings, Inc. v. Kittitas County, 187 Wn. App. 275, 348 P.3d 1222, 2015 Wash. App. LEXIS 891 (Apr. 23, 2015)

Counsel: *Leslie A. Powers*; and *Nicholas J. Lofing* (of *Davis Arneil Law Firm LLP*), for appellants.

Kenneth W. Harper and *Quinn N. Plant* (of *Menke Jackson Beyer LLP*); and *Gregory L. Zempel, Prosecuting Attorney*, and *Neil A. Caulkins, Deputy*, for respondent.

Judges: Authored by Robert E. Lawrence-Berrey. Concurring: Rebecca L. Pennell, Kevin M. Korsmo.

Opinion by: Robert E. Lawrence-Berrey

Opinion

[*358] [1204]**

¶1 LAWRENCE-BERREY, A.C.J. — In 2011, Kittitas County (County) issued a notice of violation and abatement (NOVA) to Chem-Safe Environmental Inc. and its parent company, ABC Holdings Inc. (collectively Chem-Safe), for storing and **[*359]** handling moderate risk waste without proper county permits. The Kittitas County Prosecuting Attorney's Office sought assistance from technical professionals at the Washington State Department of Ecology, and the deputy prosecutor and Ecology employees exchanged e-mails throughout the regulatory enforcement litigation.

¶2 Sky Allphin, Chem-Safe's president, then submitted a **[***2]** *Public Records Act (PRA)* request under *chapter 42.56 RCW*, seeking the County's records pertaining to the case, including its attorneys' e-mails and correspondence. The trial court reviewed the e-mails in camera and determined they were a product of litigation ongoing between the County and Mr. Allphin and were, therefore, exempt from production under the PRA.

¶3 Mr. Allphin argues the sealed e-mails are not attorney work product or attorney client privileged and, even if they are, the County waived any privilege when it exchanged the e-mails with Ecology. In the published portion of this opinion, we discuss the "common interest doctrine," an exception to the rule that the presence of a third party **[**1205]** to a communication waives a privilege. We hold that this doctrine applies here and the County did not waive any privilege by consulting with Ecology.

¶4 Mr. Allphin also argues (1) the County's exemption logs are inadequate, (2) the County violated the PRA when it initially withheld or redacted records and then subsequently produced those same records, (3) the County failed to provide the fullest assistance, (4) the County unlawfully withheld handwritten notes by Richard Granberg, and (5) the County abused the judicial **[***3]** process and this court should release the e-mails as a sanction. In the unpublished portion of this opinion, we agree with Mr. Allphin that the County

wrongfully withheld six e-mails, but disagree with his remaining arguments. We therefore affirm in part, reverse in part, and remand for further proceedings.

[*360] FACTS

¶5 Chem-Safe operates a hazardous waste transport and transfer facility in Kittitas County, Washington. Beginning in 2009 or 2010, the County and Ecology worked with Chem-Safe to develop operations and engineering plans that would comply with Washington's waste handling regulations. In December 2010, James Rivard, the environmental health supervisor for the Kittitas County Public Health Department (KCPHD), received letters from the Idaho Department of Environmental Quality. The letters said an Idaho disposal company sent three shipments of waste back to Chem-Safe because the contents of Chem-Safe's waste drums did not match the labels on the drums or Chem-Safe's paperwork.

¶6 Mr. Rivard inspected Chem-Safe's facility and observed moderate risk waste materials. Chem-Safe did not have a permit from KCPHD to collect moderate risk waste or operate a moderate risk waste facility. Chem-Safe **[***4]** also failed to properly label hazardous waste, had unsanitary drums, and lacked a secondary containment for their drums.

¶7 The County issued Chem-Safe a NOVA, which alleged Chem-Safe had operated a hazardous waste facility without a proper permit, required Chem-Safe to take a number of abatement actions, and required Chem-Safe to suspend all facility operations until it obtained a permit. Mr. Rivard copied his letter to Gary Bleeker, Ecology's facilities specialist lead; Wendy Neet, Ecology's solid waste inspector; and Richard Granberg, Ecology's hazardous waste specialist. The County issued a health order that incorporated the NOVA's findings and requirements.

¶8 Chem-Safe appealed the NOVA and the hearing examiner affirmed. Chem-Safe appealed to the superior court, which also affirmed and ordered Chem-Safe to submit a sampling plan and test its facility. Chem-Safe then **[*361]** appealed to this court. We upheld the NOVA and concluded Chem-Safe did not comply with the County's permitting ordinances. *See ABC Holdings, Inc. v. Kittitas County, 187 Wn. App. 275, 284-86, 289, 348 P.3d 1222, review denied, 184 Wn.2d 1014, 360 P.3d 817 (2015).*

¶9 Chem-Safe also brought a *42 U.S.C. § 1983* claim in federal court against the County, Ecology, Mr. Rivard, Mr. Granberg, Mr. Bleeker, and two other Ecology employees—Norman Peck with Ecology's toxics **[***5]** cleanup program, and his supervisor, Valerie Bound.

¶10 The Kittitas County Prosecuting Attorney's Office originally assigned Deputy Prosecutor Suzanne Becker to handle the Chem-Safe litigation. Deputy Prosecutor Zera Lowe later took over the case. The County's employees and Ecology's employees e-mailed one another and met in person throughout Chem-Safe's various appeals, and Ecology's employees generally acted in a consultative role with respect to the civil enforcement action. For example, Mr. Peck kept Mr. Rivard updated as to whether Chem-Safe had submitted a sampling plan, and discussed what the plan needed to include in order to meet both agencies' requirements. After Chem-Safe moved to stay the superior court's order, Ms. Lowe e-mailed Mr. Peck and asked for help responding to and gathering additional declarations. Mr. Peck e-mailed Chem-Safe's declarations to the other Ecology employees in order to coordinate a response, and also met with Ms. Lowe and Mr. Rivard.

¶11 On October 17, 2012, Mr. Allphin submitted a PRA request to the County requesting "[a]ll documentation, correspondence, pictures, **[**1206]** court records and emails to and from Kittitas County Public Health and Kittitas County Prosecutors **[***6]** Office regarding Chem-Safe Environmental, Inc. dating from January 1, 2010 to current."[1] Clerk's Papers (CP) at 70. Mr. Allphin sent Ecology a similar **[*362]** request, seeking all of Ecology's documents regarding Chem-Safe. This request included all communications between Ecology and the Kittitas County Prosecuting Attorney's Office while working on the Chem-Safe case.

¶12 Ms. Lowe and legal secretary Angela Bugni were responsible for responding to Mr. Allphin's PRA request. When Ms. Lowe learned Mr. Allphin had also requested records from Ecology, she asked Ecology's public records officer not to release any records containing communications between the County's legal counsel and Ecology employees that would disclose legal strategy or the attorneys' thought processes. Ecology's records officer advised Ms. Lowe that Ecology would not release the records until the County sought court protection. However, Ecology inadvertently released a few e-mails between Ms. Becker (the former deputy prosecutor) and Ecology that Ms. Lowe believed **[***7]** contained attorney work product.

¶13 The County filed a complaint in the superior court naming Mr. Allphin, Chem-Safe, and Ecology as respondents. The complaint sought a declaratory judgment that the County

[1] Mr. Allphin also submitted two more PRA requests on November 21, 2012, and January 29, 2013. These requests were not voluminous, and the County responded to these requests without controversy.

and Ecology's e-mails were attorney work product and attorney client privileged and thus exempt from production under the PRA. The County moved the superior court to review the records in camera and also moved for a temporary restraining order (TRO) enjoining Ecology from releasing the challenged records until the court had the chance to review them.

¶14 At the hearing, the County handed up one sealed envelope with the caption "DOCUMENTS SUBMITTED FOR IN CAMERA REVIEW." CP at 781. The cover sheet identified 11 individual e-mails and identified the sender, recipients, and date and time at which the e-mail was sent.

¶15 The superior court reserved ruling at the hearing and later issued a memorandum decision. The court reviewed the records in camera and determined the e-mails were a product of litigation ongoing between the County and Mr. Allphin and were, therefore, exempt from production **[*363]** under the PRA. The superior court also held the fact that the County e-mailed Ecology during the litigation did not waive **[***8]** this privilege, given that the County and Ecology worked cooperatively to enforce the environmental laws and were thus on the same "legal team." CP at 788.

¶16 In December 2013, the superior court incorporated its memorandum decision into a final order, dissolved the TRO, and permanently enjoined Ecology from producing the 11 e-mails it reviewed in camera. The court ordered Ecology to produce the e-mails it previously withheld under the TRO. The court found that sealing satisfied the *Ishikawa*[2] factors, then sealed the e-mails.

¶17 In March 2014, Mr. Allphin filed an amended answer and brought counterclaims against the County, alleging the County failed to provide the fullest assistance and unlawfully withheld nonexempt records. The County obtained new counsel. Throughout the next several months, the County and Mr. Allphin exchanged a number of letters discussing the adequacy of the County's PRA response.

¶18 In one of his letters, Mr. Allphin listed 21 additional e-mails from the County's exemption logs that he wanted the court to review in camera. Mr. Allphin disagreed with the County's claim that these e-mails were work product and thus exempt from disclosure. The County agreed to assemble the 21 e-mails **[***9]** for a second in camera review. Mr. Allphin and the County continued to fine tune the list of records the County would submit for the second in camera review.

¶19 The County and Mr. Allphin both moved for summary judgment. At the hearing, the County handed the court a sealed envelope containing 21 e-mails. The court **[**1207]** reviewed them and determined they contained attorney work product and were thus exempt from production under the PRA. The court ruled the County and Ecology exchanged the e-mails in response to the ongoing Chem-Safe **[*364]** litigation, and that the County and Ecology shared a common interest in the enforcement of state and local environmental regulations. The court also found the County's initial claims of exemption were lawful, that the County provided its fullest assistance, and that Mr. Granberg's handwritten notes, i.e., the "smoking gun memorandum," was not a county record and, therefore, the County had no duty to disclose it. CP at 2982. The court then granted summary judgment for the County. The court then sealed the e-mails and granted final judgment for the County. Mr. Allphin appeals.

ANALYSIS

A. STANDARD OF REVIEW

¶20 This court reviews public agency actions challenged under the PRA de novo. **[***10]** *RCW 42.56.550(3)*. We also review a summary judgment order de novo, engaging in the same inquiry as the trial court. *Andrews v. Wash. State Patrol, 183 Wn. App. 644, 650, 334 P.3d 94 (2014), review denied, 182 Wn.2d 1011, 343 P.3d 760 (2015)*. Summary judgment is proper where the pleadings and affidavits show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *CR 56(c)*. In reviewing a motion for summary judgment, we construe the facts and reasonable inferences in favor of the nonmoving party. *Andrews, 183 Wn. App. at 650-51*. When the record consists entirely of documentary evidence and affidavits, we stand in the same position as the trial court and generally are not bound by the trial court's factual findings. *Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 252-53, 884 P.2d 592 (1994)* (plurality opinion).

B. SEALED RECORDS FROM THE IN CAMERA REVIEW HEARINGS

[1, 2] ¶21 The PRA is a "strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)*. It requires all state **[*365]** and local agencies to disclose any public record on request, unless the record falls within certain narrowly construed exemptions. *RCW 42.56.070(1), .030*. It is the agency's burden to show a redacted or withheld record was exempt. *RCW 42.56.550(1)*. Where the agency possesses undisclosed responsive records, it "must explain and justify any withholding, in whole or in part, of any requested public records." *Resident Action Council v. Seattle Hous. Auth., 177*

[2] *Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982)*.

Wn.2d 417, 432, 327 P.3d 600 (2013). "Silent withholding is prohibited." *Id.*

1. *The 21 e-mails from the second* **[***11]** *in camera review hearing*

¶22 Mr. Allphin argues that the 21 e-mails the trial court sealed following the second in camera review hearing are not exempt under the PRA because they do not contain attorney work product and are not attorney client privileged.

[3-5] ¶23 Under *RCW 42.56.290*, an agency does not have to disclose "[r]ecords 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." This includes communications containing attorney work product. *Block v. City of Gold Bar, 189 Wn. App. 262, 279-80, 355 P.3d 266 (2015), review denied, 184 Wn.2d 1037, 379 P.3d 951 (2016)*. The attorney client privilege similarly protects confidential communications between an attorney and a client from discovery or public disclosure. *Mechling v. City of Monroe, 152 Wn. App. 830, 852, 222 P.3d 808 (2009)*; *RCW 5.60.060(2)(a)*.

¶24 Attorney work product includes "documents and other tangible things that (1) show legal research and opinions, mental impressions, theories, or conclusions of the attorney or of other representatives of a party; (2) are an attorney's written notes or memoranda of factual statements or investigation; and (3) are formal or written statements **[*366]** 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)*.[3] Work **[**1208]** product documents need **[***12]** not be prepared personally by counsel; they can be prepared by or for the party or the party's representative as long as they are prepared in anticipation of litigation. *See CR 26(b)(4)*.

¶25 Mr. Allphin argues two of the e-mails in the second index for in camera review—numbers 2 and 21—were not sent or received by attorneys at all, but were exchanged between Mr. Rivard and Mr. Peck, neither of whom are attorneys. However, number 2 on the index is an e-mail that Mr. Rivard sent to Mr. Peck *and* Ms. Lowe. *See* CP at 3239. The index sheet simply fails to list Ms. Lowe as a recipient. Number 21 on the index is an e-mail Mr. Rivard sent only to Mr. Peck. However, the substance of Mr. Rivard's e-mail is a forwarded message from Ms. Lowe, who asked Mr. Rivard to pass along the message to Mr. Peck. *See* CP at 3389.

[6, 7] ¶26 Mr. Allphin also argues the 21 e-mails, while originating **[***13]** from an attorney, do not constitute attorney work product because they are not "mental impressions, thoughts, and theories," and are therefore not exempt under the PRA. Br. of Appellant at 24. However, under *Limstrom* and *Koenig*, the e-mails need only contain statements of fact gathered by an attorney or prepared by or for the party or the party's representative in anticipation of litigation. Without specifically describing the substance of the actual e-mails, it is clear these e-mails contain statements of fact and legal strategies prepared by and for the various employees **[*367]** of the County and Ecology in response to the Chem-Safe litigation.[4]

2. *Waiver*

¶27 Mr. Allphin argues the County waived any protected, privileged, or confidential right to the e-mails because its employees sent them to Ecology employees throughout the Chem-Safe litigation. Mr. Allphin specifically challenges the trial court's finding that the County did not waive these privileges due to the fact that the County and Ecology worked cooperatively to enforce the environmental laws and were thus on the same "legal team." CP at 788.

[8, 9] ¶28 Generally, a party waives the attorney work product privilege if that party discloses documents to other persons with the intention that an adversary can see the documents. *Limstrom v. Ladenburg, 110 Wn. App. 133, 145, 39 P.3d 351 (2002)*. Similarly, to qualify for attorney client privilege, a communication must be made in confidence. *Morgan v. City*

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[3] *Limstrom* held the broad civil discovery rule, *CR 26(b)(4)*, applies when determining whether records are exempt from production under *RCW 42.56.290*, rather than the much narrower criminal discovery rule, *CrR 4.7(f)(1)*, which protects documents from disclosure under the PRA only "'to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies.'" *Koenig v. Pierce County, 151 Wn. App. 221, 230, 211 P.3d 423 (2009)* (quoting *CrR 4.7(f)(1)*).

[4] Mr. Allphin argues the e-mails were not marked "confidential" or "work product" to protect from disclosure. Br. of Appellant at 24. The record does not support this argument. The first e-mail to which Mr. Allphin cites for this argument contains a disclaimer that begins, in capital letters, with "CONFIDENTIALITY NOTICE." CP at 2237. The 21 sealed e-mails all contain similar disclaimers. Mr. Allphin also argues that even assuming the e-mails are work product, this court should order the County to produce them under *CR 26(b)(4)*'s exception to the work product privilege. However, *CR 26(b)(4)* provides that **[***14]** a party seeking attorney work product may obtain it *only* after showing that he or she "has substantial need of the materials in the preparation of such party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Mr. Allphin fails to explain why he meets either of these requirements.

of Federal Way, 166 Wn.2d 747, 757, 213 P.3d 596 (2009). The presence of a third person during the communication waives the privilege, unless the third person is necessary for the [***15] communication or has retained the attorney on a matter of "'common interest.'" Id. (quoting Broyles v. Thurston County, 147 Wn. App. 409, 442, 195 P.3d 985 (2008)).
[*368]

¶29 "The 'common interest' doctrine provides that when multiple parties share confidential communications pertaining to their common claim or defense, the communications remain privileged as to those outside their group." Sanders v. State, 169 Wn.2d 827, 853, 240 P.3d 120 (2010); see also C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 716, 985 P.2d 262 (1999). The common interest doctrine is an [**1209] exception to the general rule that the voluntary disclosure of a privileged attorney client or work product communication to a third party waives the privilege. Avocent Redmond Corp. v. Rose Elecs., Inc., 516 F. Supp. 2d 1199, 1202 (W.D. Wash. 2007).

[10, 11] ¶30 "The common interest or joint defense privilege applies where (1) the communication was made by separate parties in the course of a matter of common interest or joint defense; (2) the communication was designed to further that effort; and (3) the privilege has not been waived." Id. at 1203. A written agreement regarding the privilege is not required, but "the parties must invoke the privilege: they must intend and agree to undertake a joint defense effort." Id.; see also In re Pac. Pictures Corp., 679 F.3d 1121, 1129 (9th Cir. 2012) ("[T]he parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement—whether written or unwritten.").

[12, 13] ¶31 The common interest doctrine applies in the PRA context. Sanders, 169 Wn.2d at 854. "[D]ocuments that fall [***16] under the common interest doctrine are not discoverable in civil cases and so are exempt under the controversy exemption." Id. The *Sanders* court held the common interest doctrine exempted certain documents from disclosure under the PRA even if the Attorney General's Office (AGO) shared those documents with other agencies.[5] Id. at 840, 853-54.
[*369]

¶32 In contrast, in *Morgan*, a municipal court judge who was the subject of a hostile work environment investigation e-mailed the city attorney and complained the investigation created a hostile work environment for him. Morgan, 166 Wn.2d at 752. The judge then forwarded that e-mail message to the private e-mail address of one of the city council members. Id. The local newspaper filed a PRA request for the investigator's report, and the judge moved to prevent its release. Id. The court held the attorney client privilege did not apply to the e-mail the judge sent to the city attorney and the e-mail was therefore not exempt under the PRA. Id. at 757. This was because the judge later forwarded that e-mail to the city council [***17] member and the judge failed to demonstrate a common legal interest between him and the city council member. Id.

¶33 Here, although the County and Ecology did not have a joint prosecution agreement, a written agreement was not required because the record demonstrates the two agencies agreed to undertake a joint/common cause in the regulatory enforcement litigation against Chem-Safe. At the very beginning of the case, Ms. Becker e-mailed Mr. Granberg, Mr. Rivard, and Mr. Bleeker and scheduled a meeting to discuss Chem-Safe's compliance with Washington's permitting, transportation, storage, and disposal regulations. Throughout the litigation, the County asked Ecology questions about Chem-Safe's testing plans and about Chem-Safe's engineering and technical arguments. The record demonstrates Ecology was "acting in a consultative role with respect to the civil enforcement action."[6] CP at 1412.

¶34 Mr. Allphin argues that the County and Ecology did not have a common interest because the County sued Ecology to prevent Ecology from releasing the records, thus [*370] making Ecology an opposing party for purposes of waiver. This argument conflates the two lawsuits. While the County listed Ecology as a respondent in *this case* in order to prevent Ecology from producing exempt documents, the County and Ecology were on the same legal team for purposes of the underlying regulatory enforcement action, which is separate from this PRA case.
[**1210]

¶35 Mr. Allphin also argues that the common interest doctrine is not a statutorily listed PRA exemption and, therefore, the

[5] The *Sanders* court never explained what these documents were, what other agencies the AGO shared them with, or the nature of the relationship between the AGO and these other agencies. See Sanders, 169 Wn.2d at 837-41.

[6] In fact, this collaborative relationship between the County and Ecology is statutorily required. RCW 70.105.005(10) provides that "because local conditions vary substantially in regard to the quantities, risks, and management opportunities available for such wastes, local government is the appropriate level of government to plan for [***18] and carry out programs to manage moderate-risk waste, *with assistance and coordination provided by* [*Ecology*]." (Emphasis added.)

County cannot use it as a basis for withholding the e-mails. The *Sanders* court expressly rejected this argument, finding that the common interest doctrine is merely a common law exception to waiver of privilege that applies when parties share a common interest in litigation. *Sanders, 169 Wn.2d at 853*.

¶36 While it is true that no attorney client relationship existed between the county prosecutor and Ecology, we hold the lack of such a relationship **[***19]** does not prevent the county prosecutor from seeking assistance from Ecology's technical professionals in enforcing the state and county environmental laws. Releasing these records would force government attorneys to forgo communicating with other law enforcement professionals during litigation due to the fear that their opponents will obtain their mental impressions and ideas.

¶37 Because the communications between the County and Ecology throughout the Chem-Safe litigation were protected under the work product and attorney client privileges, we conclude the trial court properly sealed the sets of 11 and 21 e-mails.

¶38 A majority of the panel has determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record in accordance with *RCW 2.06.040*.

ADDITIONAL FACTS

A. THE COUNTY'S RESPONSE TO MR. ALLPHIN'S PRA REQUEST

¶39 After Mr. Allphin submitted his PRA request, Ms. Lowe and Ms. Bugni first transmitted his request to the county departments they believed might have records. They then searched the prosecuting attorney's office's physical files. Next, they searched the office's network **[***20]** drive using key words. Also using key words, Ms. Bugni searched her e-mail account and Ms. Lowe searched both her own and Ms. Becker's e-mail accounts. The two then got permission from the county commissioners to search the County's archival system to find deleted e-mails. Through March 20, 2013, the County expended roughly 357 hours on Mr. Allphin's PRA response, which did not include the 115 hours spent addressing attorney work product and attorney client privilege redaction issues. Ms. Bugni personally spent over 200 hours working on the County's response.

¶40 At KCPHD, Mr. Rivard received the copy of Mr. Allphin's PRA request from Ms. Lowe. Like Ms. Lowe and Ms. Bugni, Mr. Rivard searched his office's physical files and used keywords to search the shared files on the office's computer server, his computer, and his e-mail. Mr. Rivard reviewed every e-mail he sent and received from January 1, 2010 to October 17, 2012. Mr. Rivard eventually realized some of the e-mails in his account did not contain attachments. He contacted the County's information technology department about the issue, which told him the County's archiving system changed and he needed to find the attachments in a separate **[***21]** archival system. After that, Mr. Rivard went to the separate archival system to print the attachments to his e-mails. Mr. Rivard reviewed his e-mails to ensure he had included all of the pages and attachments and then sent them to Ms. Lowe, so that she could send them to Mr. Allphin. Mr. Rivard also searched the County's digital camera and memory card. Mr. Rivard expended roughly 180 hours on Mr. Allphin's PRA response.

¶41 Several days after Mr. Allphin submitted his PRA request, Ms. Lowe sent Mr. Allphin a letter stating the County needed to provide the requested documents in installments due to the large number of records the County needed to retrieve and review. Ms. Lowe said the County would provide the first installment on November 8, 2012, and would then continue providing scheduled installments until it fulfilled Mr. Allphin's request.

¶42 The County then produced records in the following installments:

- November 8, 2012: County disclosed a list of 88 different court records, totaling 1,786 pages.[7]
- December 21, 2012: County produced 1,022 pages.
- January 23, 2013: the County produced 1,481 pages.
- February 27, 2013: the County produced 850 pages. In the letter, Ms. Lowe noted that the **[***22]** County would include a detailed log if it withheld or redacted any documents, and also noted that the County retained the right to seek court protection of exempt records.
- March 27, 2013: the County produced 2,400 pages.
- March 28, 2013: the County produced 1,007 pages, some of which were redacted or withheld, and an exemption log.
- April 2, 2013: the County produced 72 pages, some of which were redacted or withheld, and an exemption log.
- April 26, 2013: the County produced 131 pages and 34 phone logs.
- May 24, 2013: the County produced 2,320 pages, including 111 e-mails without any redaction, 22 with some portions redacted. The County withheld 11 e-mails because they were either work product or attorney client

[7] On November 28, Ms. Lowe sent Mr. Allphin a letter in which she asked if Mr. Allphin wanted the court records, asked how he wanted the records produced, and asked from which specific departments he sought records.

privileged. The County included an exemption log.
• June 19, 2013: the County produced 10,500 pages.
• July 26, 2013: the County produced 44 e-mails without redaction.
• August 26, 2013: the County produced 28 e-mails, some of which had portions redacted. The County included an exemption log.
• September 30, 2013: the County produced 15 e-mails without redaction, three with some part redacted, and withheld 2. The County included an exemption log.

• October 28, 2013: the County **[***23]** produced 17 e-mails without redaction, and withheld 18 e-mails. The County included an exemption log.
• November 18, 2013: the County produced 7 e-mails with redactions and included an exemption log.
• December 23, 2013: the County produced 4 e-mails with no redactions, 5 e-mails with redactions, and withheld 10 e-mails. The County attached an exemption log.
• January 13, 2014: the County produced 52 e-mails with no redaction and 3 e-mails with redaction. The County included an exemption log.

¶43 Ms. Lowe retired in mid-2013 and Deputy Prosecutor Paul Sander assumed responsibility for responding to the PRA request. On January 28, 2014, Mr. Sander sent Mr. Allphin a letter advising him that he had concluded his search for records and the January 13, 2014 installment was the final installment.

B. LITIGATION PRIOR TO THE FIRST IN CAMERA REVIEW HEARING

¶44 After moving for the TRO, the County discovered Mr. Allphin's former counsel would not be back from vacation until the day of the hearing, **[***24]** so Ms. Lowe reset the hearing for later in the week. The day before the hearing, Chem-Safe's new counsel e-mailed Ms. Lowe and asked for a continuance, which Ms. Lowe declined. Later that day, Mr. Allphin moved to disqualify Judge SCOTT SPARKS and Judge FRANCES CHMELEWSKI and submitted affidavits of prejudice for each judge—one from Mr. Allphin, and one from another one of Chem-Safe's officers.[8] The day of the hearing, Judge CHMELEWSKI called the case, noted the existence of the two affidavits, and ruled a visiting judge would hear the case.

¶45 Visiting Judge BLAINE GIBSON found the affidavit filed against Judge SPARKS was invalid and the case should proceed before Judge SPARKS. Judge Gibson extended the TRO until Judge SPARKS could review the records in camera. The County stated it no longer sought to restrain the records Ecology had already released.

C. COUNTY ACKNOWLEDGES ERRORS FROM IN CAMERA REVIEW HEARING

¶46 After Mr. Allphin filed his amended answer, the County, through new counsel, sent Mr. **[***25]** Allphin a letter concerning the County's production of the remainder of the requested records. In this letter, the County stated many of the records it had listed on the exemption log were duplicates. The County also acknowledged the index of 11 e-mails it had submitted to the court at the first in camera review hearing contained errors. The County told Mr. Allphin the e-mail identified as number 7 on the index—purportedly a July 18, 2011, 7:31 a.m. e-mail from Mr. Rivard to Ms. Becker—was erroneously designated on the index. The e-mail the County actually submitted as number 7 on the index was an e-mail from Mr. Rivard to Ms. Lowe and Mr. Peck, sent on July 19, 2012, at 12:46 p.m.

¶47 The County also stated the envelope contained eight additional e-mails that were not listed on the index. The reason the index did not identify these e-mails was because they were contained in e-mail chains, and the index only listed the first e-mail in the chain. Mr. Allphin responded to the County's letter and agreed the County produced some of the records it claimed to have produced, but disagreed that the County had produced others.

¶48 The County moved to amend the superior court's final order from the first **[***26]** in camera review hearing. In its motion, the County acknowledged the errors in the index it had attached to the envelope. The County asked the court to issue an amended order that correctly listed the e-mails the County submitted for in camera review. The County also asked the court to review an additional e-mail it had failed to provide the court at the first in camera review hearing. Mr. Allphin argued the County made material misrepresentations and abused the judicial process, and asked the court to release the records as a sanction and award him fees and costs. The court determined the record was adequate and denied the County's motion.

¶49 Mr. Allphin sent the County a letter describing 11 e-mails that were still possibly missing.[9] The County said it would look into these missing e-mails. The County also produced the 8 e-mails it had failed to list on the index because they were buried in e-mail chains, and also produced the 1 additional e-mail it failed to provide the court. The County acknowledged

[8] Kittitas County has two superior court judges. When both judges are precluded from hearing a case, the court administrator finds a visiting judge to preside over the case, usually from Yakima County.

[9] These 11 e-mails are different than the 11 e-mails the court reviewed at the first in camera review hearing.

Ecology produced these e-mails after the in camera review hearing because they were not included in the court's sealing order, thereby waiving the work product and attorney client privileges. **[***27]**

¶50 The County's new counsel forwarded Mr. Allphin's e-mail about the 11 possibly missing e-mails to Ms. Bugni, and Ms. Bugni searched for them in the County's archival e-mail system. Ms. Bugni forwarded the list to KCPHD so it could check its archives as well. Ms. Bugni and KCPHD were able to find several of the missing e-mails, and also found three e-mails with time and date stamps that were similar, but not identical, to e-mails Mr. Allphin claimed were missing.

¶51 The County told Mr. Allphin it had located several of the 11 "possibly missing" e-mails and produced them, and also advised it had previously disclosed 4 of them. The County also told Mr. Allphin it was still unable to locate the remainder of the possibly missing e-mails, but was able to locate three e-mails with similar delivery dates and times. The County produced these three e-mails. The County also produced a copy of handwritten notes between Mr. Granberg and Mr. Rivard.

¶52 Mr. Allphin responded that he was certain the other "possibly missing" e-mails existed and asked the County to check again. Ms. Bugni searched again **[***28]** and was unable to locate them on any County system.

ADDITIONAL ANALYSIS

A. ADEQUACY OF EXEMPTION LOGS

¶53 Mr. Allphin argues the County's exemption logs are inadequate because none of them listed the common interest doctrine as a basis for withholding the records.

¶54 When an agency withholds or redacts records, its response "shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." *RCW 42.56.210(3)*. The agency must do more than identify the record and the specific exemption—it must explain how the exemption applies to the record. *Block, 189 Wn. App. at 282* (quoting *City of Lakewood v. Koenig, 182 Wn.2d 87, 94, 343 P.3d 335 (2014)*). "The level of detail necessary for a requestor to determine whether an exemption is properly invoked will depend upon both the nature of the exemption and the nature of the document or information." *City of Lakewood, 182 Wn.2d at 95*. "An agency violates the PRA by failing to provide an adequate explanation." *Block, 189 Wn. App. at 283*.

¶55 Here, the County's exemption logs all specifically identify the redacted or withheld e-mails by author, recipients, date, time, and number of pages. The logs also contain a column that provides an accurate description of the e-mails' contents. For example, number 84 on the exemption **[***29]** log states the record being withheld was an "E mail to Becker re CSE operations plan—questions re type of permit." CP at 668. The logs state the County redacted or withheld the e-mails under the controversy exemption, *RCW 42.56.290*, and list "[a]ttorney work product" as the basis for which the e-mails would not be discoverable under the civil rules. CP at 668. It was also apparent the "controversy" at issue was the regulatory enforcement action surrounding the NOVA. *Cf. Sanders, 169 Wn.2d at 846* (holding the AGO's exemptions logs were inadequate because they claimed the controversy exemption for numerous records without specifying details such as the controversy to which each record was relevant). Given that the common interest doctrine is merely a common law exception to waiver and not a separate exemption, the County's explanation that the e-mails were "work product" was sufficient to explain why the County was withholding them. Between this explanation and the County's description of each e-mail's contents, we conclude the County's exemption logs were adequate.

B. INITIAL WITHHOLDING AND SUBSEQUENT PRODUCTION

¶56 Mr. Allphin argues the County violated the PRA when it initially withheld e-mails and then subsequently produced them.

¶57 If an agency produces **[***30]** documents after the requester files suit, this is not an ipso facto admission that the initial withholding of the documents was wrongful. *Sanders, 169 Wn.2d at 849*. "Rather, the appropriate inquiry is whether the records are exempt from disclosure." *Id.* "If they are exempt, the agency's withholding of them was lawful and its subsequent production of them irrelevant." *Id. at 849-50*. "If they are nonexempt, the agency wrongfully withheld the records and the appropriate penalty applies for the numbers of days the record was wrongfully withheld—in other words, until the record was produced." *Id. at 850*. An agency is permitted to maintain certain documents are exempt but also produce them anyway if the agency determines their production would be innocuous. *Id. at 849*.

¶58 Here, the County initially withheld or redacted many e-mails because they were attorney work product or attorney client privileged. After Ecology inadvertently released many of these e-mails, the County no longer claimed the e-mails were exempt and subsequently produced them. The County argues it did not violate the PRA because it continually stayed in a "cooperative dialogue" with Mr. Allphin. Br. of Resp't at 39. But this is not a recognized statutory exemption. If the County withheld **[***31]** nonexempt e-mails, it violated the PRA.

1. *March 27-28, 2013 exemption log*

¶59 Mr. Allphin argues the County improperly withheld a chain of six e-mails on its March 27-28, 2013 exemption log. *See* CP at 1569-70. The County withheld these six e-mails on the basis that they were "[a]ttorney-client privileged e mail communications between legal counsel and client." CP at 1566. The senders and recipients of these e-mails were Brenda Larsen, who is the Kittitas County fire marshal, Alan Crankovich, who is on the Kittitas County Board of Commissioners, Barry Kerth, a deputy fire marshal, and Mr. Rivard. None of these individuals are attorneys. This chain of six e-mails was therefore not exempt from disclosure under RCW 42.56.290 and the County violated the PRA when it initially withheld and subsequently produced them. Thus, a per diem penalty applies for the numbers of days these e-mails were wrongfully withheld.[10]

2. *April 2, 2013 exemption log*

¶60 Mr. Allphin argues the County's April 2, 2013 exemption log lists a number of e-mails that do not contain work product or attorney client communications **[***32]** and, therefore, the County wrongfully withheld these e-mails. Mr. Allphin does not identify specific e-mails, but cites broadly to "CP at 2236-2479." Br. of Appellant at 33. We have reviewed every e-mail to which Mr. Allphin cites and, with the exception of two, a deputy prosecutor (either Ms. Becker or Ms. Lowe) was either the sender or a recipient on every one. Accordingly, all of these e-mails were exempt from disclosure under the attorney work product privilege and/or the attorney client privilege and the County did not violate the PRA by subsequently producing them.

¶61 There are two e-mails in which a deputy prosecutor was not the sender or a recipient. The first is from Krystal Rodriguez to Mr. Peck, sent on July 18, 2011 at 7:43 a.m. *See* CP at 2274. But there is no indication the County ever actually withheld this e-mail, given that it is not listed in either of the County's exemption logs. The second is from Mr. Peck to Mr. Rivard and Ms. Bound, sent on June 14, 2012 at 8:02 a.m. *See* CP at 2473-74. This e-mail is listed as number 93 on the County's April 2, 2013 exemption log. *See* CP at 846. But when the County produced this chain of e-mails, it did *not* redact this particular e-mail. Rather, it produced this e-mail and redacted **[***33]** a separate e-mail in the chain, to which Ms. Lowe was a recipient. *See* CP at 865. Thus, the County's subsequent production of these e-mails did not violate the PRA.

[10] According to Mr. Allphin's declaration, the County eventually produced these six e-mails on July 3, 2013, or 98 days after initially withholding them. *See* CP at 1469.

3. *Over-redaction*

¶62 Mr. Allphin argues the County over-redacted a number of e-mails.[11] He lists two e-mails in particular. The first is from Mr. Rivard to Ms. Lowe and Mr. Peck that said, "It is ok with me if you are [at the meeting] Norm." CP at 1754. The second is from Mr. Peck to the AGO and Ms. Becker and was in response to the AGO's legal opinion regarding whether their communications were privileged. The e-mail said, "Very helpful. Thanks, Mary Sue. Have a great evening, and rest of your week. (Hopefully I won't pester you any further[.])." CP at 1743.

¶63 *RCW 5.60.060(2)(a)* provides that *any* attorney client communication is confidential. In light of our holding that the common interest doctrine protects all confidential legal communications pertaining to Ecology and the County's joint effort in the regulatory enforcement action, we conclude **[***34]** the County did not violate the PRA by redacting these e-mails.

C. FULLEST ASSISTANCE

¶64 Mr. Allphin argues the County violated the PRA by delaying its records response and failing to provide the fullest assistance.

¶65 Consistent with RCW 42.56.100, agencies must adopt rules that "provide for the fullest assistance to inquirers and the most timely possible action on requests for information," but still "prevent excessive interference with other essential functions of the agency." However, "administrative inconvenience or difficulty does not excuse strict compliance with the [PRA]." *Zink v. City of Mesa, 140 Wn. App. 328, 337, 166 P.3d 738 (2007)*. "In general, an agency should devote sufficient staff time to processing records requests, consistent with the act's requirement that fulfilling requests should not be an 'excessive interference' with the agency's 'other essential functions.'" WAC 44-14-04003(2). "The agency should recognize that fulfilling public records requests is one of the agency's duties, along with its others." *Id.*

¶66 Here, the County did not delay fulfilling the records request, nor did it fail to provide assistance in a timely manner. On October 24, 2012—five business days after Mr. Allphin submitted his request—Ms. Lowe gave Mr. Allphin a detailed explanation about how **[***35]** the County would respond to his request. Ms. Lowe and Ms. Bugni then worked

[11] RCW 42.56.210(1) provides that "the exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought."

together to send Mr. Allphin installments on a monthly basis throughout the rest of 2012, through 2013, and until Mr. Sander closed the request in 2014. Whenever the deputy prosecuting attorney did not anticipate being able to send the installment by the promised date because of illness or technical difficulties accessing the County e-mail system, Ms. Bugni would communicate this with Mr. Allphin.

¶67 The prosecuting attorney's office expended roughly 357 hours on Mr. Allphin's PRA response, which did not include the time spent addressing attorney work product and attorney client privilege issues. Ms. Bugni spent over 200 hours working on the prosecuting attorney's office's response, and Mr. Rivard spent 180 hours on KCPHD's response. Both offices were short-staffed, and Ms. Lowe, Ms. Bugni, Mr. Rivard, and Mr. Sander had to balance responding to a large request with their other official duties.

¶68 In fact, most of the delay in the initial stages of litigation was caused by the fact that Mr. Allphin filed affidavits of prejudice against both of the judges in a two-judge county. At the TRO hearings, visiting Judge Gibson **[***36]** noted that Mr. Allphin had nothing to complain about in terms of the delay, given that the case would have been much further along if he had not filed two affidavits. Judge Gibson also found the County endeavored "to resolve the matter quickly and expeditiously," and that "the delays that have resulted here have—primarily have been caused by the fact that the defendants filed two affidavits." Report of Proceedings at 131-32. We conclude the County did not delay its records response, nor did it fail to provide the fullest assistance.

D. MR. GRANBERG'S HANDWRITTEN NOTES

¶69 Mr. Allphin argues the County possessed Mr. Granberg's handwritten notes, which he describes as the "smoking gun memorandum," at the time he submitted his PRA request. Br. of Appellant at 47. He contends the County intentionally withheld these notes until it used them against him in the federal lawsuit.

¶70 "An agency is only required to provide access to public records it has or has used." *WAC 44-14-04004(4)(a)*. "An agency must only provide access to public records in existence at the time of the request. ... [I]f a public record is created or comes into the possession of the agency after the request is received by the agency, it is not responsive **[***37]** to the request and need not be provided." *Id.*

¶71 The record demonstrates Ecology—not the County—possessed Mr. Granberg's handwritten notes at the time Mr. Allphin submitted his PRA request. Mr. Rivard (a County employee) and Mr. Granberg (an Ecology employee) worked together to inspect Chem-Safe's facility. Mr. Rivard sent Mr. Granberg an e-mail on March 7, 2011, to which he attached two color photographs of chemical drums and nothing else.[12] Mr. Granberg then took notes based off of these photographs. Ecology was the only agency that had a copy of Mr. Granberg's notes, until Ecology sent the County a compact disc containing records that Ecology had given Mr. Allphin. This happened after Mr. Allphin filed his PRA request with the County and, therefore, the County was not required to produce it.

¶72 Mr. Allphin argues the County possessed Mr. Granberg's notes at the time of Mr. Allphin's PRA request because the notes were transmitted from the County's copier to a County employee and then forwarded to an Ecology employee in 2011. **[***38]** To support this argument, Mr. Allphin cites to his declaration. However, his declaration says nothing about a copier of any kind, and simply repeats that Mr. Rivard sent Mr. Granberg the notes in the March 7, 2011 e-mail.

¶73 Mr. Allphin also cites to the County's filings in federal court, which stated that on March 7, 2011, Mr. Granberg gave Mr. Rivard handwritten notes based on Mr. Granberg's review of photographs of Chem-Safe's facility. *See* CP at 1955-56, 1965-66. The County included this in its filing because it initially believed the March 7, 2011 e-mail included Mr. Granberg's notes based on one of Mr. Allphin's earlier declarations. Based on all of the evidence in the record, reasonable minds could not differ that the County did not possess Mr. Granberg's notes at the time Mr. Allphin filed his PRA request. We conclude the County did not wrongfully withhold Mr. Granberg's handwritten notes.

E. MR. ALLPHIN'S REQUEST TO UNSEAL THE 11 E-MAILS AS A SANCTION

¶74 Mr. Allphin argues the County abused the in camera review process at the September 9, 2013 hearing by including e-mails in the envelope that did not match the accompanying index. Mr. Allphin asks this court to release the 11 e-mails as a sanction, regardless **[***39]** of their PRA exemption status. Mr. Allphin cites *RCW 2.28.010(3)*, which gives Washington courts power "[t]o provide for the orderly conduct of proceedings before it or its officers," and *Yurtis v. Phipps, 143 Wn. App. 680, 693, 181 P.3d 849 (2008)*, which is a case about a vexatious litigant who filed multiple frivolous lawsuits.

¶75 Mr. Allphin is correct that the e-mails the County submitted in the envelope at the first in camera review hearing did not correspond to the e-mails the County listed on the

[12] Ms. Bugni also declared she used the County's archival system to search for the March 7, 2011 e-mail and the attachment contained two photographs but no handwritten notes.

index. The County argues that this was a mutual mistake, that the parties spoke past one another at the hearing, and that it sent Mr. Allphin a letter and moved the trial court to clarify the ruling when it realized its error.

¶76 It is difficult to see how this was a "mutual mistake" when the County prepared the envelope, prepared the index, and was the only party with access to the 11 e-mails. However, in this case, the County's error did not tangibly harm Mr. Allphin. Because the County included the eight extra e-mails in the envelope but did not list them on the index, the trial court did not include those e-mails in its sealing order. Because of this, Ecology later produced them to Mr. Allphin. Thus, the County's failure to list the e-mails on the index actually *benefitted* **[***40]** Mr. Allphin.

¶77 In addition, the parties agreed to include the July 19, 2012, 12:46 p.m. e-mail the County had erroneously put in the envelope at the first in camera review hearing on the list of 21 e-mails for the court to review at the second in camera hearing. The trial court ultimately determined this e-mail was exempt from disclosure. There is no evidence in the record that the e-mail the County originally designated as number 7 on the index—from Mr. Rivard to Ms. Becker on July 18, 2011 at 7:31 a.m.—ever actually existed. The parties do not discuss it in any of their subsequent correspondence, and it is not listed on any of the County's exemption logs. Because the County's error did not actually harm Mr. Allphin, we reject his invitation to unseal the 11 e-mails the trial court sealed at the first in camera review hearing as a sanction.

F. COSTS AND PER DIEM PENALTY

¶78 Mr. Allphin requests costs, including reasonable attorney fees, incurred on appeal. Under RCW 42.56.550(4), a party that prevails against an agency in an action under the PRA is entitled to an award of "all costs, including reasonable attorney fees, incurred in connection with such legal action." When a party seeking disclosure under the **[***41]** PRA prevails with respect to some but not all of the requested documents, costs and attorney fees should be awarded only in relation to the documents or portions that the court requires to be produced, and not to any documents or portions the court finds to be exempt from production. Sanders, 169 Wn.2d at 867, 870.[13] Mr. Allphin prevailed very narrowly and is entitled only to an award of costs and attorney fees reasonably incurred in obtaining the six e-mails located at CP 1569-70.

¶79 We direct our court commissioner to determine the appropriate cost and attorney fee award for those costs Mr. Allphin incurred on appeal relating to these six e-mails. Consistent with RAP 18.1(i), we direct the trial court to determine the appropriate cost and attorney fee award for those costs Mr. Allphin incurred in the trial court relating to these six e-mails. In addition to an award of costs and attorney fees, RCW 42.56.550(4) gives a court discretion to award Mr. Allphin a per diem penalty for each day the County withheld these records. We defer this discretionary award to the trial court. If the trial court exercises its discretion to award a penalty, it also has discretion to treat the six e-mails as one group for purposes of calculating the daily penalty. *See* Double H, LP v. Dep't of Ecology, 166 Wn. App. 707, 714, 271 P.3d 322 (2012).

¶80 Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

KORSMO and PENNELL, JJ., concur.

Review granted at *187 Wn.2d 1001 (2017)*.

References

Washington Administrative Law Practice Manual

Washington Rules of Court Annotated (LexisNexis ed.)

Annotated Revised Code of Washington by LexisNexis

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[13] This author notes that while an award of *attorney fees* should be apportioned between successful and unsuccessful PRA claims, an award of other types of costs arguably should not be apportioned. This is because RCW 42.56.550(4) directs that "*all* costs" must be awarded to a person who prevails against an agency on a PRA claim. (Emphasis added.) "All costs" strongly suggests that the legislature intended for courts to award a successful PRA claimant "all costs" incurred. The legislature qualified its directive by using the term "reasonable" not before costs, but before "attorney fees."

Nevertheless, Mr. Allphin has not raised nor briefed this issue, and we do not find any clear authority. We therefore will not resolve the statutory ambiguity here. *See* Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc., 119 Wn.2d 334, 352, 831 P.2d 724 (1992) (stating **[***42]** that when the law is unsettled, an appellate court should not attempt to resolve an issue unless it is briefed by the parties).

FREIMUND JACKSON & TARDIF P.L.L.C

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