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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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

Kittitas County Superior Court Cause No.13-2-00074-4

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

v.

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

and

WASHINGTON STATE  
DEPARTMENT OF ECOLOGY,  
Defendant/Respondent.

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APPELLANTS' OPENING BRIEF

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## I. INTRODUCTION

After falsely alleging that Appellants caused a spill of hazardous waste and listing Appellants' property on a statewide contaminated sites list, the Department of Ecology ("DOE") has refused, delayed, and obstructed Appellants' requests for public records substantiating the spill allegations. When the DOE refused to provide the records (investigation reports, pictures, test results, etc.) upon informal request in September 2012, Mr. Sky Allphin and his two family businesses ("Mr. Allphin" or "Chem-Safe") filed public records requests with the DOE and Kittitas County on October 17, 2012. The DOE proceeded to flood Mr. Allphin with many records (approximately 6500 pages), but silently withheld the critical records, sometimes upon the County's request and other times of its own doing. In February 2013, Kittitas County sued the DOE and Mr. Allphin to restrain Mr. Allphin's receipt and reliance on the public records. Over the course of the proceedings, it became apparent that the DOE was withholding undisclosed records. Mr. Allphin filed cross claims against the DOE in November 2014.

Additionally, Mr. Allphin requested on January 8, 2014 that the DOE update its public records response. Mr. Allphin understood that no records created after the day of the first request (October 17, 2012) would be released in response to the October 17, 2012 request. Mr. Allphin

requested to review the additional records created between October 17, 2012 and January 8, 2014, so he properly filed an additional request for these records. After initially acknowledging receipt and an understanding of the update request, the DOE inexcusably proceeded to provide nearly no responsive records.

Further, the DOE provided false, misleading, and incomplete responses to discovery requests and refused to supplement its answers. Before discovery could be completed, the DOE filed a premature and unauthorized “motion for order to show cause,” forcing Chem-Safe to present its cross-claims at a dispositive hearing prior to the completion of discovery and without records admittedly withheld and within the DOE’s possession. Chem-Safe objected, but the trial court granted the DOE’s “show cause” order regardless, dismissing with prejudice all of Chem-Safe’s cross-claims.

Chem-Safe appeals, requesting that the Court reverse the unauthorized and procedurally defective motion for “show cause” on Chem-Safe’s cross-claims. Chem-Safe requests the Court order the DOE to complete its responses to the public records requests, including logging and submitting for in camera review all those undisclosed and withheld emails and records, whether in the DOE’s possession or the possession of its attorney, the Washington Attorney General’s Office. Finally, Mr.

Allphin requests partial judgment be entered for him and his businesses as to the record-based cross-claims ready for adjudication and presented by Mr. Allphin.

## **II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED**

### **A. Assignments of Error**

Assignment of Error No. 1. The trial court erred when it granted the DOE's motion to show cause and dismissed Mr. Allphin's cross-claims. CP 2656-57, ¶¶ 1, 3; CP 2654-56, ¶ 1-18.

Assignment of Error No. 2. The trial court erred when it denied Chem-Safe's motion to review records in camera. CP 2656-57, ¶ 2.

Assignment of Error No. 3. The trial court erred when it denied Chem-Safe's partial motion for relief as to several categories of records wrongly withheld by the DOE. CP 2656-57, ¶ 2, CP 2654, ¶ 4-6, CP 2655, ¶ 7-8.

Assignment of Error No. 4. The trial court erred when it concluded that the DOE's search for responsive records was reasonably calculated to lead to the discovery of all responsive records. CP 2654, ¶ 1-3, CP 2655, ¶ 9, 11, CP 2656, ¶ 14-17.

Assignment of Error No. 5. The trial court erred when it concluded that the DOE did not violate the PRA when it coordinated with a separate

agency to conceal and withhold public records. CP 2654, ¶ 5; CP 2655, ¶ 9-11; CP 2656; ¶ 13-14, 16.

**B. Issues Pertaining to the Assignments of Error**

- 1) Did the trial court err when it granted the DOE an order dismissing Mr. Allphin's cross-claims on the DOE's motion to show cause, when no statute, rule, or case authorizes an agency to use a show cause hearing to dispose of a requester's claims and when discovery is admittedly incomplete and due to the requester?
- 2) Did the trial court err when it refused to order the DOE to submit records for in camera review when the DOE admitted that additional responsive records existed in a secret location but refused to provide those records to the court for review or to provide an exemption log as required by the PRA?
- 3) Did the DOE violate its duty under the PRA to provide responsive public records promptly, including (a) four hand-drawn sketches of the property, (b) 53 emails and 9 documents, (c) emails relating to the sampling plan, and (d) records responsive to the 1/8/14 records request?
- 4) Did the DOE conduct a reasonable search for records when one of its principal agents failed or refused to search for and provide any of his sent emails and when the DOE's records custodian failed to train, instruct,

and review the agent's search and response relating to the sent email records?

5) Did the DOE violate its duties as a responding agency under the PRA when it coordinated with a separate agency to conceal public records?

## **II. STATEMENT OF THE CASE**

### **A. Procedural Background**

Mr. Sky Allphin filed a request for public records with the Department of Ecology ("DOE") on October 17, 2012, requesting records related to his waste disposal business operations. CP 847. Mr. Allphin had submitted a similar request to Kittitas County on the same day. CP 4. Mr. Allphin was sued by the County on February 28, 2013, for filing the public records requests. CP 1. The DOE was also sued by the County. CP 1. Mr. Allphin's two family businesses, Chem-Safe Environmental, Inc. and ABC Holdings, Inc. (collectively, "Mr. Allphin") were also sued. CP 2; CP 542.

Mr. Allphin filed his cross claims against the DOE on November 3, 2014, CP 28-44, upon stipulated order to amend and add the cross claims, CP 25-27. The DOE answered on November 13, 2014. CP 45-50. Meanwhile, the County and Mr. Allphin filed cross motions for summary judgment in late 2014, on which the County prevailed. CP 51-56. The

County moved for bifurcation from the cross claims against the DOE and moved for certification as final judgment. CP 51-56. With the DOE's consent, the Court certified judgment as final on February 27, 2015. CP. 51-56. Mr. Allphin appealed the judgment granted to the County, which is currently pending on appeal before the Washington Supreme Court in Cause No. 93562-9.

In 2015, the DOE case was proceeding with discovery and depositions, before the DOE filed its "Motion for Order to Show Cause" on January 26, 2016. CP 99-132. The DOE filed eight supporting declarations of its employees and attorney generals. CP 133-435. Mr. Allphin believed the DOE's "Motion for Order to Show Cause" was premature because the DOE had discovery outstanding. CP 438-513. Realizing the DOE was refusing to provide complete discovery responses, Mr. Allphin moved the Court to compel the DOE to provide the outstanding discovery. CP 438-513. The Court heard oral argument on the motion on March 4, 2016 and took the matter under advisement. CP 96. Having received no ruling from the Court, Mr. Allphin mailed its motion requesting the Court to continue the hearing set for April 1, 2016, on the DOE's Motion to Show Cause. CP 1189-92. Later in the day that Mr. Allphin had mailed the motion, Mr. Allphin received the Court's denial of

Mr. Allphin's request to compel discovery, concluding that Mr. Allphin had not met the "strictures" of CR 26. CP 933.

Due to a number of scheduling conflicts, the Court itself had to reschedule the hearing several times. See e.g. CP 1360. During the intervening time, the DOE released several records that Mr. Allphin believed demonstrated that the DOE had falsified its discovery responses and failed to supplement its discovery. CP 1495-1505. The Court heard argument on the various motions on June 3, 2016, CP 1522, and set a discovery conference for July 8, 2016. CP 1523-1525. At the June 3, 2016 hearing, the Court ordered Mr. Allphin to list the records which he claimed to be due and withheld by the DOE. CP 1523-1525. Mr. Allphin produced the itemized list in open court, which is a handwritten document attached to the order. CP 1523-25. The DOE responded on June 20, 2016, providing additional requested records, CP 1547-2056, but denying the records had been wrongly withheld. CP 1529-1546. Mr. Allphin replied on July 1, 2016 pursuant to the Court-ordered discovery conference. CP 2057-64. The Court held a discovery conference hearing on July 11, 2016, and denied further discovery. CP 2191.

Prior to the hearing on August 11, 2016, Mr. Allphin requested the Court review records in camera pursuant to RCW 42.56.550. CP 2192-93. The Court held a hearing on August 11, 2016, and took the matter under

advisement. CP 416. The Court invited the parties to file a post-hearing memorandum summarizing their positions, which the parties filed on August 22, 2016. CP 2396-2639; 2640-50. The Court entered the DOE's proposed order on September 8, 2016. CP 2651-57. Mr. Allphin appealed timely. CP 2659-71.

## **B. Factual Background**

Mr. Allphin filed three public records requests on the DOE's form (10/17/12, 1/8/14, and 5/12/14) and three public records requests by email (12/13/12, 1/29/13, and 4/1/14). CP 543. Mr. Allphin corresponded interactively, fulfilling his duty as a requester, with the DOE in follow-up, clarification, and assistance on these requests. CP543. Mr. Allphin personally visited the DOE office on two occasions (December 23, 2014 and July 28, 2015). CP 543. The DOE failed to respond to any of the three form requests (10/17/12, 1/8/14, and 5/12/14) within the statutory 5-day period, nor even acknowledge receipt of the form requests until 10/25/12, 1/16/14, and 5/20/14, respectively. CP 543.

The subject matter of the records Mr. Allphin requested was mostly the same. CP 543. The DOE, MTCA division, had accused his businesses of having a hazardous waste spill, worked with Kittitas County to shut down his businesses, listed his property on a statewide, public database of "contaminated sites", and worked with the County to require

invasive testing, including soil and water testing underneath the concrete pad of his building. CP 543-44. Mr. Allphin adamantly opposed any allegation that a spill occurred on his property or that he operated in violation of applicable regulations. CP 544. The DOE's spill allegations and site listing affected the marketability of his property. CP 544. Because of the allegations, he sought information on the alleged spill. On September 19, 2012, he emailed Ms. Valerie Bound, a DOE employee, and requested identification of the alleged hazardous substance spill, explaining to her that for CSE's engineer to produce a required Sample and Analysis Plan (SAP), the engineer would need the location and classification of the spill. CP 544. The SAP was required to be produced to the County by November 19, 2012. CP 544. Ms. Bound never responded. CP 544. The DOE's refusal to provide Mr. Allphin with the information led to Mr. Allphin's filing the first records request on October 17, 2012. CP 544.

**a) The October 17, 2012 records request.**

The DOE did not produce its first installment of records responsive to the October 17, 2012 request until November 15, 2012. CP 545. Also on November 15, 2012, the DOE extended the estimate of time for its remaining installment to December 17, 2012. CP 545. When December 17 arrived, the DOE again extended its estimate of time to December 30,

2012, without explanation. CP 545. Then, December 30, 2012 came and went without any release of documents, explanation, or communication. CP 545. On January 2, 2013, still without any response from the DOE, Mr. Allphin emailed the DOE's records custodian to request a response for the records requested on October 17, 2012 and estimated to be released by November 19, 2012, extended to December 17, 2012, and extended to December 30, 2012. CP 545. The DOE did not respond to this email nor provide any responsive records until January 11, 2013. CP 545. The DOE's January 11, 2013 response was partial and, again, accompanied by an unexplained extension of time for an estimated additional "three weeks". CP 545. On January 28, 2013, Mr. Allphin again emailed the DOE, asking, "can you let me know when I will receive the next Public Records files?" CP 545. The DOE finally released five additional records on February 26, 2013. CP 545. At that time, the DOE claimed its response finished, subject to about 20 records it withheld and identified on an exemption log of February 26, 2013. CP 545-46. The DOE released no more than 6500 pages of records between its first release on 11/15/2012 and its final release of 2/26/13. CP 545. Many of the 6500 pages of records are duplicates. CP 545.

The DOE then went on to confirm on at least three occasions that all responsive records to the October 17, 2012 request had been either

released or identified on the February 26, 2012 exemption log. CP 546. On September 11, 2013, Mr. Johnson confirmed that on “Nov 15, 2012, January 11, 2013 and February 26, 2013 any/all responsive documents, for this request, were sent to you and/or your attorneys.” CP 545. On May 17, 2013, the DOE represented in open court that it had no documents remaining in its custody for release, other than those listed on the litigated exemption log. CP 545. The DOE again confirmed on September 27, 2013 that it had “completed its response to Mr. Allphin’s original October 2012 request...” CP 545.

However, subsequent to these repeated representations that all records had been released, the DOE went on to release many responsive records that it had been withholding. For example, the DOE released several records in summer 2014 in response to Mr. Allphin’s specific request for the records. CP 546.

Also, for example, the DOE refused to release “four hard copy documents” until Mr. Allphin went to the DOE office’s central filing room on July 28, 2015. CP 546-47. The four records, which are sketches, were in the “Chem-Safe” file the DOE maintains and kept together with other records the DOE had released to Mr. Allphin. CP 547. These four sketches were in Roger Johnson’s possession on the day after Mr. Allphin’s

10/17/12 records request, because an email so states, and as confirmed in the deposition of the sketches' author, Mr. Norm Peck. CP 547.

The largest category of such withheld records consists of at least 53 emails and nine separate documents released to Mr. Allphin for the first time on December 23, 2014. CP 547. Again, this December 23, 2014 release only followed because of Mr. Allphin's personal visit to the DOE's office. CP 547. All of the records are responsive to Mr. Allphin's October 17, 2012 request and have characteristics (author, recipient, file, subject matter) to others released to Mr. Allphin. Some of the records released for the first time on December 23, 2014, are known to have been in the DOE's possession on 10/18/12 because the DOE's staff converted and transferred the files on that date, which was confirmed in the DOE's staff's deposition. CP 548.

By way of additional example, one of the principal DOE agents working on the matter, Mr. Gary Bleeker, released only two of the many emails that he sent relating to Chem-Safe. CP 550. When asked about his withholding of his many other, known sent emails during his deposition, he explained that he did not search for sent emails when responding to Mr. Allphin's records request. CP 550. The DOE's records custodian, in charge of responding to the request, did not notice that Mr. Bleeker's sent emails were missing, nor provide him with instructions that his sent email

messages would constitute responsive public records. CP 550. Mr. Bleeker also testified in his deposition that he did not delete sent messages and never had. CP 550.

**b) The January 8, 2014 records request.**

Mr. Allphin made an additional public records request on January 8, 2014 for all additional records from the original request (10/17/12) through this subsequent request (1/8/14). CP 550. Mr. Allphin made this request to update the request to obtain records generated from 10/17/12 to 1/8/14. CP 551. Mr. Allphin made this follow-up request with specific reference to the file numbers that he had learned the DOE used to reference matters related to him and his businesses. CP 551. The DOE understood that he was requesting an updated release of records and acknowledged that the scope of the request “will have any/all documents that Ecology has received and/or generated from October 1, 2012 through January 8, 2014.” CP 551. Further, other DOE employees confirmed, understood, and internally produced records for the entire duration of October 1, 2012 to January 8, 2014, but they did not provide those records to Mr. Allphin, as requested. CP 551.

The DOE did not acknowledge the January 8, 2014 request pursuant to the statutory 5-day rule and responded for the first time on January 16, 2014. CP 551. The DOE’s own internal records demonstrate

that it knew that the 5-day deadline was January 15, 2014. CP 551. Regardless, the DOE had still not released actual records, or provided an estimated timeline, prompting Mr. Allphin to email Mr. Johnson on February 5, 2014, asking him to “please give me a timeline as to when I could expect the requested information?” CP 551. On February 11, 2014, the DOE finally responded and provided a few documents that Mr. Allphin had previously received. CP 551. As this was vastly fewer documents than were requested, Mr. Allphin immediately responded to Mr. Johnson, questioning, “Is this the complete response?” CP 551. Mr. Johnson replied the next day that he had included “all responsive documents”. CP 551. At no time did Mr. Allphin withdraw or narrow his records request nor did the DOE notify Mr. Allphin that it was treating his request more narrowly than stated initially. CP 551-52.

**c) The May 12, 2014 and May 20, 2014 records requests.**

On May 12, 2014, Mr. Allphin made an additional public records request for records. CP 552. The DOE again failed to respond within the statutory 5-day response period, not providing its response until May 20, 2014. CP 552. Mr. Allphin followed up with Mr. Johnson on May 20, 2014, with an additional email request for a “checklist”. CP 552. The DOE provided no response or acknowledgment of receipt of the May 20, 2014 request, so Mr. Allphin notified a different records officer at the DOE on

May 31, 2014, that Mr. Johnson was not answering his records request, and asked for the records again. CP 552. Mr. Johnson responded on June 2, 2014, indicating that all requested or responsive records had been released. CP 552. Knowing that the DOE had not provided the requested “checklist”, Mr. Allphin asked for a third time for the specifically requested checklist: “the DOE provides a checklist when approving MRW plans. I am asking you again, can I please receive the checklists...?” CP 552. Mr. Johnson replied on June 9, 2014 that he had done “a complete check for documents requested and all responsive have been sent,” and continued to explain that the “check list” had been sent to the counties. CP 552-53.

**d) Records released for first time in April/May 2016.**

For the first time in 2016, the DOE disclosed and released records that were responsive to Mr. Allphin’s October 17, 2012 or January 8, 2014 public records request. CP 2398. These records precipitated the need for In Camera Review of other related records. CP 2192-2201. In particular, the DOE has admitted that an entire set of previously undisclosed records exist in electronic storage known as the “AGSecured drive.” CP 2203-04. The DOE has not released these records. CP 2203-04. The DOE has not identified these records on an exemption log. CP 2203-04.

On May 20, 2016, the DOE also released a 123-page record known as “Binder1.pdf” and a related email previously omitted by the DOE. CP 2204-05. The 123-page document consists of four emails with email strings and attachments. CP 2204-05. The emails were transmitted by the DOE to the County in 2013. CP 2204-05. Prior to April 2016, the DOE had not released these emails. CP 2204-05. When it did release these records, it redacted over 60 pages of the 123-page document. CP 2204-05. One of the emails finally provided to Mr. Allphin on May 31, 2016, CP 2205, CP 2286-87, included an email with seven .pdf attachments, CP 2288. However, only the cover email and one of the .pdf attachments was provided. CP 2288-92. The one .pdf record that was provided consisted of four pages of near-entire redacted materials. CP 2289-92. Mr. Allphin objected and requested the additional .pdf attachments to the cover email. CP 1523-25, # 7; see also CP 2061-62. The DOE refused to provide the remaining .pdfs, even though it was ordered that the cover email and its attachments be provided in native format. CP 1523-25. Mr. Allphin challenged the redactions and withholding and moved for the Court’s in camera review of the records. CP 2061-62; CP 2194-2201. Again the DOE refused and the judge excused the DOE’s refusal to do so. CP 2191; CP 2651-57.

### III. ARGUMENT

#### A. This Court reviews the trial court's conclusion on in camera review and summary judgment de novo.

The PRA, RCW 42.56, is "a strongly worded mandate for broad disclosure of public records." *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, ¶ 22, 174 P.3d 60 (2007). The PRA "should be liberally construed and its exemptions should be narrowly construed in favor of disclosure." *Id.*; RCW 42.56.030. The PRA promotes open government and reflects the American principle that "full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127-28, 530 P.2d 246 (1978). The legislature tasks the judiciary with liberal construction of the PRA to further "the people's insistence that they have information about the workings of the government they created." *Nissen v. Pierce Co.*, 183 Wn.2d 863, 357 P.3d 45 (2015) (citing RCW 42.56.030).

Judicial review is de novo when agency action is challenged under the PRA. RCW 42.56.550(3). The Court's de novo review "shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others."

RCW 42.56.550(3); *Wash. State Dept. of Trans. v. Mendoza de Sugiyama*, 182 Wash.App. 588, 330 P.3d 209 (Div. 2 2014).

**B. The trial court erred when it granted the DOE an order dismissing Mr. Allphin’s cross-claims on the DOE’s motion to show cause, when no statute, rule, or case authorizes an agency to use a show cause hearing to dispose of a requester’s claims and when discovery is admittedly incomplete and due to the requester.**

On January 22, 2016, the Department of Ecology (“DOE”) noted a hearing for Chem-Safe to “show cause”. CP 99-132. The motion is procedural defective. The DOE also filed seven declarations (amounting to 303 pages) of materials. CP 133-435. Though voluminous, the DOE’s materials largely miss the mark and do not address Chem-Safe’s crossclaims, which are based on actual records wrongly withheld and delayed. The DOE failed to cite authority, and should not be permitted, to force a dispositive motion disguised as a “show cause” hearing on Chem-Safe to have the crossclaims dismissed with prejudice.

The DOE’s motion to show cause is statutorily invalid. The statute, RCW 42.56.550, provides the requester, not the agency, with the show cause hearing. RCW 42.56.550(1) provides:

*Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of*

records. The burden of proof shall be on the agency... (emphasis added).

RCW 42.56.550(2) similarly provides:

*Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show...* (emphasis added).

Similarly, the Attorney General's model rules recognize that this motion is statutorily permitted to requesters, not agencies. WAC 44-14-08004(1) provides: "the statute *allows a requestor* to seek judicial review two business days after the initial denial". (emphasis added). WAC 44-14-08004(3) goes on to explain:

**(3) Procedure.** To initiate court review of a public records case, *a requestor* can file a "motion to show cause" which *directs the agency to appear before the court and show any cause* why the agency did not violate the act... The show-cause procedure is designed so that a nonattorney requestor can obtain judicial review himself or herself without hiring an attorney. A requestor can file a motion for summary judgment to adjudicate the case. However, most cases are decided on a motion to show cause. (Emphasis added; citations omitted).

Further, even the principal case cited by the DOE, *Wood v. Thurston Co.*, 117 Wn.App. 22, 68 P.3d 1084 (Div. 2 2003), reasoned that the statute "allows Wood [the requester] to require the County [the agency] to show cause why it did not provide his requested documents."

The additional two cases footnoted by the DOE as authority do not decide or hold that an agency can move to show cause on a requester's legal claims, and the requesters in those cases apparently joined, did not oppose, or raised other contentions. Further, the Court treated the second case, *Forbes*, as a summary judgment proceeding, stating, "We affirm the trial court's summary judgment dismissal." *Forbes v. City of Gold Bar*, 171 Wn.App. 857, 859, 288 P.3d 384 (Div. 1 2012).

The statute, the WACs promulgated by the Attorney General's Office, and caselaw do not permit the agency to move for a dispositive show cause hearing. The DOE's attempt to do so here should be denied. Chem-Safe should be permitted to bring its cross-claims for adjudication, upon complete discovery or pursuant to pre-trial dispositive proceedings authorized by the Civil Rules, and not on an ad hoc basis.

Chem-Safe was diligent in the prosecution of its claims. The crossclaims were filed in November 2014. CP 28-44. The parties exchanged written discovery in the spring of 2015. CP 547. Chem-Safe took depositions of DOE employees during June and July 2015. See e.g. CP 547, 2207. Beginning in August 2015, the DOE initiated a delay and obstruct approach to Chem-Safe's supplemental discovery requests for documents admitted to exist during the June and July 2015 depositions. See CP 57-95 (Objection to DOE's Motion for Discovery Protective

Order) and CP 97-98 (Court's Order Denying Protective Order) and CP 438-524 (Chem-Safe's Motion and Memorandum for Order to Compel Discovery).

Chem-Safe requests this Court reverse the trial court's granting of the DOE's motion to show cause as procedurally impermissible, premature, and improper. Alternatively, Chem-Safe requests relief on those partial cross-claims raised in Chem-Safe's motions as ready for adjudication and reversal for further proceedings on those claims for which discovery has not yet been completed.

**C. The trial court erred when it refused to order the DOE to submit records for in camera review after the DOE admitted that additional responsive records existed in a secret location but refused to provide those records to the court for review or to provide an exemption log as required by the PRA.**

Pursuant to RCW 42.56.550(1), (3), Chem-Safe moved the Court to order the DOE to lodge withheld records with the Court and undertake in camera review. CP 2192-2201. The requested records included those records inputted at any time into or stored at any time on the DOE's "AG Secured" drive that are covered by Chem-Safe's public records requests. CP 2203-04, 2208-09.

The DOE admitted that these requested records exist, but refused to release them. CP 2203-04. For the first time in its June 17, 2016 brief, CP 2203, the DOE claimed attorney-client privilege or work product

protection over the records. Some of the records stored there may be exempt. However, the DOE has never claimed a privilege or created an exemption log, despite its clear obligation under the Public Records Act to do so. Not to log such records undermines the purpose of the PRA. *Rental Hous. Ass'n v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009)

Chem-Safe similarly moved the Court to have lodged and to review redacted DOE emails that were released by the DOE. CP 2204-05. These records consist of five separate emails from Ms. Day (DOE employee) to the County dated 4/1/2013. CP 2204-05. The five separate emails transmit seventeen (17) “.pdf” documents. CP 2204-05. Chem-Safe first became aware of these five emails and transmitted .pdf documents when Jackie Cameron partially released the record (known as “Binder1.pdf”) on May 20, 2016. CP 2204-05. Though clearly referencing five (5) separate transmitting emails, the DOE’s release only included four (4) of the five (5) emails. Chem-Safe again requested the full transmission, including the missing email and the missing attachments. CP 2205. The DOE responded on May 31, 2016, providing the one (1) omitted email, but not the seven (7) attached .pdf documents to that email. CP 2205.

The seven (7) attachments have been withheld (even after multiple requests). CP 2204-05. The DOE refuses to provide the five emails in “native format”, even though the Court ordered that the cover email and

its attachments be provided in native format. CP 1523-25. The DOE also intentionally withheld the 9/20/13; 10:33 email at the specific request of the County's attorney, who acknowledged the lack of exemption but requested it be secretly withheld. CP 2209 (referencing the email as "Number 19" in this 4/1/13 email to the DOE and discussing its contents). The 9/20/13; 10:33 email has not been sealed or protected. CP 2513. There is no justification for the DOE's redaction of the 9/20/13; 10:33 email. CP 2282. The DOE's attorney, Mr. Overton, misrepresented to the Court that the only redacted emails in the "Binder1.pdf" were those records already under seal. RP 10:15-11:12. The 9/20/13; 10:33 email and others were never sealed or placed on an exemption log. RP 12:13-13:7. They have been wrongly and silently withheld.

The three-plus year delay in releasing these records, partially redacted and withheld, has not been accompanied by a timely claim of exemption or exemption log. Secreting records does not comply with an agency's duties under the PRA, and the DOE's delay in admission and production or current claim of blanket exemption certainly cannot be seen to meet or even provide a basis for any claim of reasonableness.

The DOE may claim that the 60+ pages of redacted records and the withheld records have been sealed by court order. See CP 2204. The superior court had enjoined the DOE from releasing eleven (11)

specifically identified and independent emails. There is no possible way that the DOE's excessive 60+ pages of redactions cover up only those eleven (11) enjoined records. CP 2513. Further, the Court's February 15, 2015 sealing order did not enjoin the DOE from releasing additional records, but only authorized the County's withholding of these 21 individual records. CP 2512, CP 2204. The DOE's improper over-redaction of the "Binder1.pdf" record includes the entire redaction of a published court decision in the Tiger Oil case. CP 2232-33 (the 40+ subsequent pages of the entirely redacted Tiger Oil opinion were not duplicated here. Those 40+ pages included top-to-bottom pages of toner, in complete redactions form, identical to CP 2233. See explanation at CP 2204<sup>1</sup>). The Tiger Oil decision is a published, judicial decision. No exemption permits its withholding, which is blatantly wrongful.

RCW 42.56.550 provides that upon "the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court ... may require the responsible agency to show cause why it has refused to allow inspection or copying..." There is no categorical exemption for public records or right to refuse to produce an

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<sup>1</sup> A clerical error exists in the bates numbering to this exhibit. For purposes of this appeal, the Clerk's Papers citations have been provided to clear up the earlier numbering error.

exemption log for withheld records; a “document is never exempt from disclosure”. *Sanders v. State*, 169 Wash.2d 827, 836, 240 P.3d 120 (2010).

**D. The DOE violated the PRA as to the several identifiable public records which it unlawfully withheld.**

1) Four sketches. The DOE violated the PRA when it withheld four sketches responsive to Chem-Safe’s October 17, 2012 request, CP 2407, until July 28, 2015. CP 2397. The PRA prohibits the ‘silent withholding’ of records i.e. the failure to disclose the existence of records. *PAWS II*, 125 Wn.2d 243, 270-71, 884, P.2d 592 (1994); *Sanders*, 169 Wn.2d at 836, 240 P.3d 120. The four sketches were admittedly in the DOE’s possession on 10/17/2012, CP 2409-16, and an email dated 10/18/2012 memorializes their author’s delivery to the DOE’s records custodian, CP 2419. Only after admitting the records’ existence in the author’s 2015 deposition did the DOE turn over the records to Chem-Safe. CP 546-47. Earlier, and upon specific requests for the sketches in 2014, the DOE falsely stated that the records had already been released. CP 2420. The sketches were withheld because they illustrate the location (or lack thereof) of the hazardous waste spill the DOE fraudulently alleged occurred at the Chem-Safe facilities. CP 2421-24, CP 546-47, CP 1206. These are critical records as they relate directly to Chem-Safe’s informal, then formal, requests for evidence of the

alleged spill, including its location, so that it could conduct appropriate soil sampling. CP 1206.

2) Mr. Peck's review of Chem-Safe's sample plan. The DOE and its agents have repeatedly disclaimed having received, reviewed, and approved Chem-Safe's soil sampling plan. CP 2206. The representations have been under oath in depositions, written answers to interrogatories, and declarations. CP 2398, 2436-40. Only on June 29, 2016 did the County release a record demonstrating that the DOE's agent, Mr. Peck, did receive and review the sampling plan. CP 2441 (copy of Chem-Safe's sampling plan with Norm Peck's cover note dated 06/03/2013 stating "Chem Safe Sampling Plan with TCP Norm Peck's comments. He provide guidance doc for oil sites & ground water testing" [sic]). The record has Mr. Peck's handwritten margin notes on Chem-Safe's sample plan; the cover note records that Mr. Peck reviewed, made comments, and provided guidance. CP 2441-63.

The record is critical to Chem-Safe. Its withholding, accompanied by the DOE's repeated false statements under oath, epitomizes the DOE's bad faith and lack of transparency with Chem-Safe. The DOE continues to list Chem-Safe's property on its statewide "contaminated sites list", based on its wrongful explanation that Chem-Safe conducted soil testing and sampling prior to the DOE's review of the sampling plan. CP 2206-07.

3) 53 emails and 9 documents by Mr. Peck. The DOE violated the PRA when it withheld without disclosure 53 emails and 9 documents responsive to Chem-Safe's October 17, 2012 request until December 13 and 23, 2014. CP 2486-91. The records were demonstrably within the possession of the DOE, as its agent, Mr. Peck, saved these 62 records in an electronic database on 10/18/12. CP 2492-96. One of these records is the critical (and deficient) initial field investigation report required by the WACs for the DOE to complete and provide to the property owner. CP 2497-2500. The initial field investigation report demonstrates that Mr. Peck falsified that a "spill" occurred. The County's notes from a 6/4/13 meeting confirm that a "spill" never occurred. CP 2501-03. The DOE inexcusably withheld these records until 12/23/14. See also CP 547-48.

4) Failure to respond to the 1/8/14 request. The DOE violated the PRA when it failed to respond timely and release responsive records to Chem-Safe's 1/8/14 public records request. The 1/8/14 request sought the records that updated Chem-Safe's 10/17/12 request. CP 2627. The DOE's records custodian confirmed the DOE's understanding that Chem-Safe sought all records from 10/18/12 to 1/8/14. CP 2628-29. Internal DOE emails confirm the same. CP 2630-31. See also Section II. B. (b) above.

The DOE, however, then refused to release the records. In 2016, some of the records (e.g. the 4/1/13 email chain or sampling plan,

discussed above) were released, demonstrating the DOE's wrongful coordination with the County, withholding of records, manipulation of exemption logs, and bad faith in dealing with Chem-Safe. Having failed to respond to Chem-Safe's 1/8/14 request, the DOE has offered several, inconsistent alibis, all of which are belied by the records. For example the DOE first alleged that Chem-Safe withdrew its request by phone call on January 16, 2014. CP 2420. Then its records custodian alleged in deposition that the phone call occurred on February 5, 2014. CP 2632-33. Then the same custodian states in declaration that it occurred on February 6, 2014. CP 2634. The DOE's phone records show no call occurred; Chem-Safe never would have agreed to withdraw its request. See also CP 550-52, CP 1201-03.

**E. The DOE failed to conduct a reasonable search for records when one of its principal agents failed or refused to search for and provide any of his sent emails and when the DOE's records custodian failed to train, instruct, and review the agent's search and response relating to the sent email records.**

The DOE violated the PRA by conducting an inadequate search for records. For example, the DOE failed to train or inspect Mr. Bleeker (and presumably others) on basic search techniques to recover responsive public records, such as emails sent by Mr. Bleeker out of his Microsoft Outlook "sent messages" folder. The DOE's failure to search adequately for records resulted in the unreasonably delayed response to Chem-Safe's

requests and resulted in the wrongful withholding of many records, some finally released and others which may never be recovered.

The DOE violated the PRA when it withheld the “sent messages” from Mr. Bleeker’s Outlook email account. Mr. Bleeker admitted in his deposition that he did not search for or release his “sent messages” when he responded to Chem-Safe’s October 18, 2012 public records request. 2469, 2471. The absence of these records is apparent from the DOE’s records response, which lacks “sent” emails from Mr. Bleeker. CP 2399. Chem-Safe believed this to be the case because some of his emails were released from the recipients. CP 2399. Mr. Bleeker and the records custodian, Mr. Johnson, further admitted that he did not train or instruct Mr. Bleeker to search his sent records when responding to a public records request. CP 2481-85; see also CP 550.

**F. The DOE violated its duties as a responding agency when it coordinated with a separate agency to conceal public records.**

The record demonstrates the DOE provided “fullest assistance” to the County, but not to Chem-Safe. The DOE even sent the records requested by Chem-Safe on 10/17/2012 to the County months before releasing them to Chem-Safe. The DOE’s delay includes systemic failure to respond timely, including failing to provide an initial response to three records requests within the statutory, bright-line rule of five days (two of

which the DOE admits). That is not the fullest assistance to the requester envisioned by the letter and spirit of the PRA.

The DOE violated the PRA when it coordinated with the County to withhold and not disclose records responsive to Chem-Safe's October 17, 2012 request. On or about April 29, 2016, the DOE finally released a 4/1/13 email chain between Mr. Burns (DOE) and Ms. Lowe (County) that demonstrates at least two critical emails were possessed and silently withheld by both the DOE and the County. CP 2425-27. The DOE coordinated to withhold the two emails (10:33 a.m. and 11:26 a.m. emails). CP 2428-33 (though not sealed or claimed exempt, the DOE continues to redact unjustifiably this 10:33 a.m. email). Further, the DOE and the County coordinated to remove the records from the exemption log and not disclose their existence to Chem-Safe. CP 2434-35 (County's exemption log related to this record, which shows the unlawful manipulation of the record to remove the offensive 11:26 and 10:33 emails from the email chain. The DOE did not notify or object to the County's alteration of this exemption log, and withheld the records consistent with the alteration (and continues to redact the 10:33 email, without any basis for doing so)). Last, the DOE refused to release these emails at all until December 23, 2014. CP 2398; see also CP 2203, 2206. The DOE did not provide fullest assistance to Mr. Allphin, but coordinated with the County

to obstruct the release of records.

Additionally, the DOE has withheld its copies of the critical records at the request of the County. For example, the DOE was ordered on December 19, 2013 to release all the records it had been withholding. The DOE did release records, but the release was incomplete. Further, the DOE released its copies of some of the County's emails, not the DOE's version of the emails. The DOE continues to withhold its copies of the emails. Further, the DOE did not release two emails dated February 9, 2011 at 8:52 a.m. and 8:56 a.m. between the DOE's employees Gary Bleeker and Wendy Need. Additionally, there are five other emails listed on the County's exemption logs [at log nos. 149, 219, 222 and attachments to log nos. 104 and 106] that the DOE has never released, despite the records' identifying an author/recipient as a DOE employee.

When asked about missing emails by Chem-Safe, the DOE repeatedly stated that all the emails in its possession had been released. CP 545-46. However, the County continued to identify and withhold records demonstrably transferred between the DOE and the County. For example, the DOE stated in open court on May 17, 2013, that the entirety of its records had either been released or were listed on the County's exemption log and subject to the restraining order. CP 545. However, the County went on to identify and withhold many other County-DOE records (i.e. not

released by the DOE and not subject to the restraining order). At least twenty-one (21) of these were challenged by Chem-Safe in the County litigation. See list at CP 2512. Regardless of the outcome, the point is the DOE falsely stated that all records had been released, and made the false statement repeatedly, only to have further proceedings demonstrate that it in fact was silently withholding a vast number of responsive records.

The DOE's other response to Chem-Safe's objection that critical emails were missing was to dismiss the objection, stating that the records were "non-essential" and "non-retainable", and, therefore, deleted. Chem-Safe objected to such deletions as unauthorized under the PRA and amounting to the destruction of evidence. Chem-Safe does not know what records have been actually deleted, but believes the records still remain in the DOE's possession, as the DOE has been able to release the records when it finds such releases opportune. Recently, the DOE has claimed the withheld records are non-disclosable "litigation emails" by filing an amicus brief in the Supreme Court.<sup>2</sup> The DOE's position that the emails constitute "litigation emails" in the Supreme Court contradicts and compromises its position that the emails are "non-essential" and can be

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<sup>2</sup> Mr. Allphin requests the Court take judicial notice of the DOE's attorneys' brief, attached for convenience, and also available online at [https://www.courts.wa.gov/appellate\\_trial\\_courts/coaBriefs/index.cfm?fa=coaBriefs.ScHome&courtId=A08](https://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coaBriefs.ScHome&courtId=A08)

deleted as lacking retention value in these proceedings. The inconsistent positions cannot stand, but further highlight the recalcitrance, obstruction, and failure to assist Mr. Allphin in obtaining the requested public records.

#### IV. CONCLUSION

The trial court's grant of summary judgment for the DOE should be reversed and summary judgment for Mr. Allphin should be granted for the record-based violations raised by Mr. Allphin, with remand for further proceedings, including in camera review and a penalties hearing. The DOE should be ordered to produce an exemption log for the undisclosed and withheld records, as well as submit those records for in camera review.

#### VI. REQUEST FOR ATTORNEY FEES UNDER RAP 18.1

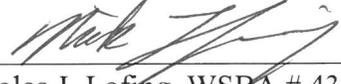
Mr. Allphin requests attorney fees and expenses pursuant to RAP 18.1 for this appeal. The right to recover reasonable attorney fees or expenses on review is granted to Mr. Allphin by RCW 42.56.550.

Respectfully submitted this 17<sup>th</sup> day of March, 2017.

POWERS & THERRIEN, P.S.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of eighteen (18) years, not a party to the above-entitled action, competent to be a witness, and on the day set forth below, I served the document(s) to which this is attached, in the manner noted on the following person(s):

First Class U.S. Mail	Clerk of the Court Court of Appeals, Division III 500 North Cedar Street Spokane WA 99201-1905
Email: <a href="mailto:lee.overton@atg.wa.gov">lee.overton@atg.wa.gov</a> <a href="mailto:RebeccaF1@ATG.WA.GOV">RebeccaF1@ATG.WA.GOV</a> <a href="mailto:TeresaT@ATG.WA.GOV">TeresaT@ATG.WA.GOV</a>	Lee Overton Attorney General's Office P.O. Box 40117 Olympia WA 98504-0117

DATED this 17th day of March, 2017 at Wenatchee, Washington.

  
\_\_\_\_\_  
Nick Lofing

NO. 93562-9

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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

Petitioners,

v.

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

Respondent.

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**BRIEF OF AMICUS CURIAE STATE OF WASHINGTON**

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## I. INTRODUCTION

The Court of Appeals correctly applied the work product doctrine, holding that county attorney work product retained its privilege when shared with consulting state agency employees. This Court should affirm because the privilege is not waived when work product is disclosed to a third party under conditions that ensure the material will not fall into the hands of an adversary. The Court of Appeals also correctly applied this Court's precedent pertaining to a related but distinct doctrine, the common interest exception to waiver, which allows disclosure without loss of privilege to a third party joined in pursuit of a common interest.

Petitioners argue that the work product privilege cannot survive disclosure to a third party, and that the County waived its privilege when it revealed legal opinions and strategy with the Department of Ecology, a third party. This confuses the work product privilege with the attorney-client privilege. The purposes are different, yielding different conditions for waiver. The purpose of the work product privilege requires courts to distinguish between disclosures to adversaries and disclosures to non-adversaries. Because the work product doctrine serves to protect an attorney's work product from falling into the hands of an adversary, a disclosure to a third party does not necessarily waive the protection of the work product privilege.

Consistent with this inherent aspect of the work product doctrine, the common interest doctrine, endorsed by this Court in *Sanders v. State*, addresses the waiver issue squarely, excepting third-party disclosures from waiver through specific requirements that ensure an adversary would not gain access. Under this doctrine, privilege is not waived if the disclosure was made in the course of a joint effort, it was designed to further that effort, and the underlying privilege not waived outside of the common interest group.

The 32 emails at issue here, exchanged to further a shared litigation goal and with effort to maintain confidentiality against opponents, fall comfortably within the ambits of both the broader principle and the narrower common interest doctrine. They should be accorded the privilege without waiver.

## **II. IDENTITY AND INTEREST OF AMICUS**

Amicus Curiae is the State of Washington, whose administrative and regulatory agencies often align and collaborate with other government agencies both in the ordinary course of business and in anticipation of litigation. The State's interest here relates to collaboration in anticipation of litigation. Communicating about legal strategy can be critical to the orderly pursuit of goals it shares with other government agencies. Ensuring the confidentiality of such exchanges is essential, and is

accomplished in large part by reliance on the work product privilege. Without this privilege to protect their communications, government agencies would be disadvantaged in litigation.

State statutory schemes frequently create, in effect, a division of labor, with state agencies developing expertise and adopting technical regulations, and local governments administering permit and enforcement regimes while relying on the state agency for technical assistance and regulatory interpretation. The statutory schemes governing shorelines management and solid waste management are examples of this. *See* RCW 90.58.050; RCW 70.95.020. Collaboration and assistance is expected during the ordinary course of business, but when litigation is anticipated or commences, with state and local governments aligned, privileged consultation on technical matters and regulatory interpretation to inform legal strategy is appropriate and occasionally essential. Alignment in anticipation of litigation also arises where there is no express statutory division of labor, such as when a state agency with relevant expertise informs a county prosecuting attorney's legal position and strategy in the context of civil proceedings brought by the county, or when a county collaborates with the state in a matter such as antitrust litigation.

Upholding the important doctrines surrounding work product ensures that Washington agencies can continue to work with other

government agencies when their interests align, with the expectation that work product communications will be privileged.

### III. ARGUMENT

#### A. Work Product Is Exempt From Production Under the Public Records Act

Records not discoverable in the context of a controversy under the civil rules of pretrial discovery are exempt from production under the Public Records Act (PRA). RCW 42.56.290. Civil Rule 26(b)(4) embraces the work product doctrine, protecting from discovery documents prepared by a party or its representative in anticipation of litigation.<sup>1</sup> *Harris v. Drake*, 152 Wn.2d 480, 485–86, 99 P.3d 872 (2004); *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985). Work product is therefore exempt from production under the PRA. *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 608–09, 963 P.2d 869 (1998).

#### B. The Court Determined That the 32 Emails Are Work Product

The trial court enjoined Ecology from releasing 11 emails exchanged between Kittitas County attorneys and Department of Ecology employees, concluding that “it is clear and there is no doubt that the

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<sup>1</sup> The civil rule establishes two tiers of work product protection. First, an attorney’s documented “mental impressions, conclusions, opinions, or legal theories” are always immune from discovery. CR 26(b)(4). Second, other documents “prepared in anticipation of litigation or for trial by or for another party” are exempt from disclosure unless the party seeking disclosure demonstrates a substantial need for them and an inability without undue hardship to procure their equivalent by other means. *Id.*

emails were a product of the litigation . . . and relate only to the facts, legal strategy, and issues involved in that litigation.” CP 788. The court also found that 21 emails in the County’s possession were “created at the request of and in coordination with the County attorney,” and “reveal litigation strategy of the County as well as the opinions, theories and legal analysis of its attorney.” CP 2968. Finding the emails to be attorney work product, the trial court held them exempt from production under the PRA.<sup>2</sup>

**C. The Privilege Survives Disclosure of Work Product to a Third Party if It Would Not Result in Disclosure to an Adversary**

This Court has held, when considering whether the attorney work product privilege attached to a given document, that “the better approach to the problem is to look to the specific parties involved and the expectations of those parties.” *Heidebrink*, 104 Wn.2d at 400; *Harris*, 152 Wn.2d at 487. This approach should apply equally to the question whether a given work product was disclosed with an expectation of confidentiality. Washington courts have held, as did the appellate court here, that disclosure of work product to a third party does not constitute waiver if there is little or no risk that the materials will fall in to the hands of the disclosing party’s adversary. *Kittitas Cty. v. Allphin*, 195 Wn. App. 355, 367, 381 P.3d 1202 (2016), *review granted in part*, 386 P.3d 1089 (2017);

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<sup>2</sup> For purposes of its analysis in this amicus brief, the State accepts the trial court’s work product determinations. The State does not address any alleged factual disputes over the work product nature of the documents.

*Limstrom v. Ladenburg*, 110 Wn. App. 133, 145, 39 P.3d 351 (2002); *Mockovak v. King Cty.*, No. 74459-3-I, 2016 WL 7470087, at \*10 (Wash. Ct. App. Div. I, Dec. 19, 2016) (unpublished) (“mere disclosure is insufficient if the party who allegedly waived the protection did not do so in a way that would disclose the documents to an adverse party”).<sup>3</sup>

Here, the emails between County attorneys and Ecology employees were written in anticipation of litigation by the County attorneys, they relate to the opinions, theories, and legal analysis of the County attorneys in that litigation, and they were disclosed with expectation of confidentiality. CP 788.

The view that disclosure to a third party does not constitute waiver if there is little or no risk that the materials will fall in to the hands of the disclosing party’s adversary is the preferred view in the federal courts.<sup>4</sup> Lewis H. Orland, *Observations on the Work Product Rule*, 29 Gonz. L. Rev. 281, 295 (1993–94). Most federal cases confronting the issue have held that disclosure of a document to third persons should not waive the work product immunity unless it has substantially increased the

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<sup>3</sup> *Mockovak* is an unpublished opinion, cited pursuant to GR 14.1. It has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

<sup>4</sup> The language of CR 26(b)(4), governing work product, is nearly identical to Fed. R. Civ. P. 26(b)(3). *Soter*, 162 Wn.2d at 739. Where a state rule is identical to its federal counterpart, analyses of the federal rule provide persuasive guidance as to the application of our comparable state rule. *Id.*

opportunities for potential adversaries to obtain the information. 8 Charles A. Wright et al., *Federal Practice & Procedure: Civil* § 2024 (3rd ed. Update 2016). The few federal cases to the contrary confuse the work product immunity with the attorney-client privilege. Wright, *supra* § 2024.

The purpose of the work product doctrine differs from that of the attorney-client privilege. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1428 (3rd Cir. 1991). The purpose of the work product doctrine requires courts to distinguish between disclosures to adversaries and disclosures to non-adversaries. *Westinghouse Elec.*, 951 F.2d at 1428. The attorney-client privilege promotes the attorney-client relationship, and, indirectly, the functioning of the legal system, by protecting the confidentiality of communications between clients and their attorneys. *Id.* In contrast, the work product doctrine promotes the adversary system directly by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation. *Id.* Protecting attorneys' work product promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients. *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S. Ct. 385, 91 L. Ed. 451 (1947); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

The work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent. *Am. Tel. & Tel.*, 642 F.2d at 1299 (citing *Hickman*, 329 U.S. at 510-11). The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation. *Am. Tel. & Tel.*, 642 F.2d at 1299.

A disclosure to a third party will waive the attorney-client privilege unless the disclosure is necessary to further the goal of enabling the client to seek informed legal assistance. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 757, 213 P.3d 596 (2009); *Westinghouse Elec.*, 951 F.2d at 1428. But because the work product doctrine serves instead to protect an attorney's work product from falling into the hands of an adversary, "disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege." *Am. Tel. & Tel.*, 642 F.2d at 1299. Thus, most courts hold that to waive the protection of the work product doctrine, the disclosure must enable an adversary to gain access to the information. *Westinghouse Elec.*, 951 F.2d at 1428; *In re Chevron Corp.*, 633 F.3d 153, 165 (3rd Cir. 2011); *In re Grand Jury Subpoena*, 220

F.3d 406, 409 (5th Cir. 2000); *United States v. Deloitte LLP*, 610 F.3d 129, 139–40 (D.C. Cir. 2010) (listing cases finding no waiver); *In re Doe*, 662 F.2d 1073, 1081 (4th Cir. 1981).

**D. A Party Who Assists a Government Agency in Investigation or Prosecution of Another Is Not an Adversary**

With respect to the disclosure and development of work product, the government has the same entitlement as any other party to assistance from those with shared interests, whatever their motives. *Am. Tel. & Tel.*, 642 F.2d at 1300. A person who assists the government in investigating or prosecuting another is not an adversary, and the mere fact of disclosure of work product to such a person does not result in waiver of the privilege.<sup>5</sup> *Id.* There is no reason why this protection should not equally cover written communications of work product between government agencies. In any such case, the nature of the interactions and assistance between the agencies, before and after litigation commences, is relevant to establishing whether there is an adversarial relationship.

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<sup>5</sup> Petitioners make much of the trial court’s use of the expression “legal team” to characterize the relationship between the County attorneys and the Ecology employees who assisted them in both the pre-litigation regulatory enforcement and in the litigation that followed. The trial court here appears to highlight the assistance that Ecology provided throughout this matter, in order to demonstrate that Ecology, far from being an adversary, was a committed partner and helpful confidante in both pre-litigation enforcement and preparation for litigation. This point does not rely on any equivalence with the relationship between attorney and investigator in *Soter*.

**E. It Is Irrelevant That Ecology Employees Were Not Hired by County**

Petitioners argue that *Soter v. Cowles Publishing Company* supports their contention that the County's attorneys waived their privilege when they disclosed work product to Ecology employees. Suppl. Br. of Pet'rs at 17. This argument is misguided, focusing on the irrelevant.

In *Soter*, attorneys hired an investigator to conduct client and witness interviews on behalf of their client, in anticipation of litigation. *Soter*, 162 Wn.2d at 725. The investigator made notes reflecting his thoughts on the interviews. The Court considered whether the work product privilege attached to these notes and held that it did, thus concluding that the notes were exempt from production under the Public Records Act. *Id.* at 744. Petitioners state that “[t]he critical distinction between *Soter* and the present case is that the school district hired the private investigator specifically for the purposes of preparing for the lawsuit,” whereas the County did not hire the Ecology employees. Suppl. Br. of Pet'rs at 17. But the distinction is not critical because it is not relevant. *Soter* addressed the question whether documents created by an investigator qualified as work product when they were created without the involvement of the attorneys, even if on their behalf. No analogous question is presented here. The emails at issue were direct correspondence

between County attorneys and Ecology employees about legal strategy in the case. Whether or not the Ecology employees were hired by the County when they acted in this consultative capacity has no relevance to the question of whether the County attorneys consulted with them on the basis of shared litigation interests and with a well-grounded expectation of confidentiality.

**F. The Common Interest Doctrine Yields the Same Result**

Application of the common interest doctrine to these facts yields the same result, excepting from waiver the work product disclosed in the 32 emails.<sup>6</sup> The common interest doctrine is the rule 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). Work product immunity is not waived if the disclosure of the work product is made in the course of a joint effort, it is designed to further that effort, and the underlying privilege has not been waived outside of the common interest group. *Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3rd Cir. 1986).

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<sup>6</sup> As shown above, there was no waiver of the work product privilege by sharing documents with others because of a continued expectation of confidentiality. Thus, the common interest doctrine, which operates as an exception to waiver, is not needed here. By contrast, the common interest doctrine would be needed if the case involved attorney-client privilege—to ensure exception to waiver of the attorney-client privilege because, given the purpose of that privilege, there is no assured protection when disclosing to non-adversaries.

The doctrine does not itself afford a privilege, but provides an exception to the rule that voluntary disclosure of privileged work product to a third party waives the privilege. *Avocent Redmond Corp. v. Rose Elec., Inc.*, 516 F. Supp. 2d 1199, 1202 (W.D. Wash. 2007). No written agreement is required, but the parties must intend and agree to work jointly with respect to the litigation. *Avocent Redmond*, 516 F. Supp. 2d at 1203; *see also In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012). The common interest doctrine applies in the PRA context. *Sanders*, 169 Wn.2d at 854. The *Sanders* court held that certain documents were exempt from disclosure under the PRA as work product under the common interest doctrine, acknowledging that the Attorney General's Office had shared those documents with other agencies, including County agencies. *Id.* at 840, 853–54.

Here, Ecology had an interest in the County's success in defending against Petitioners' appeal of its enforcement order. The County's order was issued in January 2011, after two years of cooperative efforts between County and Ecology staff to bring Petitioners into compliance with state and local regulatory requirements. CP 1265. Although these two years of efforts make it clear that the regulatory aims of the agencies were aligned, they are distinct and of a different nature from the agencies' joint efforts in preparation for litigation, after the order was appealed. It is apparent from

disclosed emails that County attorneys and Ecology began working together to defend the County's order soon after Petitioners appealed it. CP 1715. By summer of 2011, the County attorneys had begun working with Ecology, exchanging legal opinions and strategy in preparation for the impending litigation, creating the work product emails here at issue. CP 1047, 1380. While correspondence between the agencies during the pre-litigation regulatory enforcement period may not have been protected, the 32 emails, exchanged in obvious agreement to further a shared litigation goal and with effort to maintain confidentiality *against opponents*, fall comfortably within the ambits of both the broader non-waiver principle and the narrower common interest doctrine. They should be accorded the privilege without waiver.

#### IV. CONCLUSION

For the foregoing reasons, the Court should conclude that the 32 emails did not lose their work product immunity when exchanged between County attorneys and Ecology employees, and are therefore exempt from

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disclosure under the PRA.

RESPECTFULLY SUBMITTED this 10th day of February 2017.

ROBERT W. FERGUSON  
Attorney General

A handwritten signature in black ink, appearing to read 'R. Ferguson', with a long horizontal flourish extending to the right.

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