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No. 231364

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CODY SOTER, a minor child; FRANCIS SOTER and GLENDA CARR, individually, and as parents of CODY SOTER; THE ESTATE OF NATHAN WALTERS, a deceased minor child; RICK WALTERS and TERESA WALTERS, deceased minor child; and SPOKANE SCHOOL DISTRICT NO. 81, a Washington municipal corporation,

Respondents.

v.

COWLES PUBLISHING COMPANY, a Washington corporation,

Appellant,

APPEAL FROM SPOKANE COUNTY SUPERIOR COURT

THE HONORABLE JEROME LEVEQUE

REPLY BRIEF OF APPELLANT COWLES PUBLISHING COMPANY

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I. INTRODUCTION

In its brief to this Court, Respondent Spokane School District No. 81 (“the District”) rails against a private citizen’s choice to make a public records request as an abuse of the Public Disclosure Act because of that citizen’s alleged “extremist philosophy” and encourages the Court to draw a line between public records requests based upon the identity of the requesting party. The District further seeks an exception to the long-standing rule that work product is not absolutely barred from disclosure for those who, like the District and its counsel, purportedly believed that their records would not be disclosed under any circumstance. Yet, a private citizen requesting public records is not required to agree with any particular “philosophy,” and the work product doctrine allows disclosure in certain circumstances regardless of whether the attorneys and their clients believed at the time the documents were created that the documents would not be disclosed. Such arguments contravene both the letter and the spirit of the Public Disclosure Act and mock the Legislature’s clear directive that the people, regardless of their alleged “philosophy,” have the right to examine public records.

Because the District has failed to meet its burden to show that the requested records are protected by the attorney-client privilege and

because work product is not an absolute bar to disclosure where, as here, a party demonstrates a substantial need for disclosure and there is no other reasonable avenue of discovery of the facts contained within the records, the trial court should be reversed and the District should be required to produce the requested public records, as appropriately redacted, to Appellant Cowles Publishing Company, publisher of *The Spokesman-Review* (hereafter “*The Spokesman-Review*”).

II. ARGUMENT

A. **The Burden To Justify Non-Disclosure Remains On The Public Agency, And The Public Disclosure Act Contemplates Access For All Members Of The Public, Including The Media.**

The Washington Legislature did not exclude members of the media from public records access. Indeed, under RCW 42.17.270, “[a]gencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request...”. No matter who makes the request, the burden of proof is on the agency, and the agency must demonstrate that the requested records, in whole or in part, are exempt from disclosure pursuant to specific statutory provision. RCW 42.17.340(1).

Here, the District has attempted, at every opportunity, to shift the burden to *The Spokesman-Review* to defend the propriety of its request.

First, the District filed this lawsuit against *The Spokesman-Review*, forcing it to incur the costs of coming into Court to defend a lawsuit. Though *The Spokesman-Review* agrees that the impropriety of this procedural discrepancy is moot, given its responsive show cause motion in the trial court, filed in order to reach the substantive issues in this matter (*see* C.P. 761-67), the instigation of the lawsuit evidences the District's attitude that *The Spokesman-Review* is at fault for making a public records request.¹

The District continues this theme through its repeated references to *The Spokesman-Review*'s status as a member of the media. In its responsive Brief to this Court, the District repeatedly attacks *The Spokesman-Review* for availing itself of the right of access to public documents guaranteed by the Washington Legislature. *See, e.g.*, Response Brief, p. 3 ("Cowles' stated interest is to publish further news articles for a readership that allegedly desires to know more about 'what happened'...Cowles simply cannot believe that the District... [would take]

¹ As observed by the North Carolina Court of Appeals, "[a]llowing a governmental agency to bring a declaratory judgment action against someone who has not initiated litigation will have a chilling effect on the public, in essence eliminating the protection offered them under the statute by requiring them 'to defend civil actions they otherwise might not have commenced,...thus frustrating the Legislature's purpose of furthering the fundamental right of every person...to have prompt access to information in the possession of public agencies.'" *City of Burlington v. Boney Publishers*, 600 S.E. 2d 872, 877 (N.C. App. 2004), *citing McCormick v. Hanson Aggregates Southeast, Inc.*, 596 S.E. 431, 434 (N.C. App. 2004).

the risk of angering Cowles and potentially thereby its readership...the interests of the School District...arise from...[fear that its privileged and work product materials] would be disclosed...to the media...for the mere cost of a postage stamp and a one-sentence Public Records Act request); p. 4 (“However frustrating...[alleged work product and privilege exemptions to disclosure] may be for Cowles Publishing Company in view of its extremist philosophical bent...”); p. 30 (“Cowles’ extremist philosophical bent causes it to make the astonishing argument...”); p. 33 (“Cowles’ extremist media bent” colors its arguments); p. 35 (“even a first-year school administrator or attorney – or even a first-year journalist, for that matter, would” allegedly anticipate a claim against the District); p. 65 (*The Spokesman-Review* “has to prepare (and sell) newspapers”); p. 66 (“a substantial need for information to write news articles to sell newspapers” is an insufficient basis for disclosure).²

² The strategy of attacking *The Spokesman-Review*’s status as a newspaper has tainted the District’s arguments throughout this litigation. See, e.g., C.P. 338 (stating that the District must be able to communicate with its counsel and generate work product “without fear that disclosure...[may be] compelled on five days’ notice to any citizen (much less to the media...)”); C.P. 609 (arguing *The Spokesman-Review* “seeks this information only to publish a sensational story”); C.P. 612 (claiming *The Spokesman-Review* has no need for the information because it has no pending litigation but instead “has to prepare (and sell) newspapers”); C.P. 745 (accusing *The Spokesman-Review* of seeking to “publish further articles setting forth the salacious details of Nathan’s death”).

However, the law is clear that the Public Disclosure Act applies to all citizens, not just those of a particular “philosophical bent” that meets the District’s approval. The District’s continued references to the media as distinct from any other citizen filing a request for access to public records underscore that the District seeks to challenge why the requester seeks material rather than defending its claim that every single document in its possession related to Nathan Walters’ death is work product or protected by attorney-client privilege. But public records and the information contained therein do not belong to the District or its attorneys, or to those sharing a particular viewpoint, but to the people – all of the people. Indeed, the Legislature was explicit:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know...

RCW 42.17.251. A requester’s job title, purpose, personal politics or “philosophy” simply does not constitute justification for an agency’s denial of access. Such arguments, particularly coming from the government as a defense for its actions, denigrate both the Public Disclosure Act and the very nature of an open government.

B. The District Refuses To Produce Even Portions Of Its Records, And Affirming The Trial Court's Decision Will Encourage Agencies To Entrust All Sensitive Administrative Investigations To Counsel.

The core issue of this case is whether a public agency can avoid its statutory requirements to disclose public records by designating a private investigator and outside counsel as the sole parties responsible for assembling and maintaining all records pertaining to an issue of public importance – the death of a 10-year-old child on a school-sponsored field trip. That is precisely what occurred upon the death of Nathan Walters. After District officials learned of Nathan Walters' death, they immediately transferred all investigative responsibility to its outside counsel and private investigator. Though the District's own administrative procedures require the District to conduct an investigation, including obtaining witness statements from various specified persons, the District relied upon the investigator and counsel for those tasks, including gathering facts and interviewing witnesses. As a result, the District has no records other than those at issue relating to its investigation into the death of Nathan Walters.

1. The District Must Release Those Portions Of The Records Which Are Not Privileged Or Work Product.

The Spokesman-Review has repeatedly stated that it does not seek portions of documents evincing the mental impressions, conclusions,

opinions or legal theories of counsel for the District. *See, e.g.*, Opening Brief, p. 19. Instead, *The Spokesman-Review* seeks the records of the District which evidence those facts known to the District at the time the District entered into a settlement by which it agreed to pay nearly \$1 million to the Walters family. The District ignores *The Spokesman-Review's* repeated assurances that it does not seek the District's attorney's legal strategies in favor of a stonewalling stance that all records, no matter what they contain or by whom they were created, assembled in the context of purported anticipation of litigation cannot be disclosed.

However, the Public Disclosure Act specifically provides for redaction of exempt material from records produced. *See* RCW 42.17.310(2) (“...the exemptions of this section are inapplicable to the extent that the [exempt] information...can be deleted from the specific records sought”). The District has failed to produce even a single record with the offending material redacted to protect purported privilege and/or work product. It is beyond logic that, out of all of the requested documents, not one sentence does not contain either privileged or work product material.

Given that *The Spokesman-Review* seeks only records reflecting facts (not legal opinions, analyses or theories), the District will not be

prejudiced by complying with the law and producing factual portions of the requested records. For example, the District claims that certain photographs taken by its investigator constitute work product.³ The District's chart describing the documents notes that Document No. 63 includes "Photographs of Riddle Farm, with notes on reverse side." C.P. 80. Despite the obvious ease of redacting these notes that purportedly constitute work product (assuming that these notes were created by counsel, a fact unknown to *The Spokesman-Review*), the District continues to withhold the entire document. Under RCW 42.17.310(2), an agency must produce portions of a public record even if other parts of the document are exempt. The District has failed to do so.

2. Records Created During The Course Of An Administrative Investigation Are Not Work Product.

The trial court found that all of the requested records constitute either attorney-client privileged material or work product, but, in keeping with the District's broad claim that each and every document is exempt under both, did not specify which doctrine applied to which record. As discussed in detail below, the vast majority of the requested documents do

³ *The Spokesman-Review* notes that the District appears to drop its argument that these photographs are also privileged. Response Brief, p. 44. The District had claimed both work product doctrine and attorney-client privilege for each and every document withheld at the trial court level. Response Brief, App. A; C.P. 70-85.

not constitute communications or reflect communications so that the attorney-client privilege applies. Moreover, the work product doctrine does not protect records generated in compliance with internal agency procedures. *See, e.g., Cowles Publishing Company v. Spokane*, 69 Wash.App. 678, 682 (1993) (records assembled by police department in compliance with internal rules mandating compilation of such records are not exempt investigative records despite constituting reports of specific incidents of persons coming into contact with police dogs).

Here, the District attempts to avoid policies it adopted and published to the public regarding administrative investigations to be undertaken if a student is injured by claiming that it routinely ignores such requirements and thus cannot have substituted counsel's investigation for that required under District policies. The District's self-serving argument is circular and can be summarized as follows: (1) the District publishes procedures requiring an administrative investigation into injuries to students, including interviews with witnesses and fact-gathering (C.P. 249-253); (2) Nathan Walters is injured while on a school field trip; (2) the District makes a public statement that it hired a private investigator "to make sure [the investigation into Nathan Walters' death] was objective and wanted to have someone with experience" (C.P. 309-312); (3) in

contrast to this public statement, according to testimony after the fact by counsel for the District, counsel retained the private investigator to assist counsel concerning litigation that never occurred and not to objectively investigate the incident (Response Brief, pp. 12-13); (4) counsel and the private investigator interview witnesses and investigate; (5) aside from investigation completed by counsel and the private investigator, the District does not investigate as required under its procedures; and finally (6) the public should acknowledge, after being misled by the District, that the District's failure to follow its own procedures does not render the actual investigation conducted by representatives of the District, its counsel and private investigator, a substitute administrative investigation.

Yet, if the District had not delegated its administrative investigation to outside counsel and the private investigator, the same steps would have been taken by District employees in order to comply with the District's own procedures. Moreover, the District represented to the public (prior to this lawsuit) that the District wanted an "objective" analysis and therefore hired a private investigator. Surely, the District did not (and should not) expect its counsel to undertake an objective analysis – indeed, the District's counsel's focus, from the start, has been to protect the District. The Court is thus left with the District's public statements

contrasted with its counsel's testimony as to the purpose of the private investigator. On one hand, the District may have hired the private investigator so that the District's own investigation would not be colored by involvement of District personnel, as stated prior to the instant suit; on the other, the District's counsel may have hired the investigator to assist in counsel's analysis, as counsel testified after this lawsuit had been filed. The District's statements at the time the investigation was initiated indicate that the District knew it had a duty to investigate and hired the investigator to do so – as such, the documents are not work product.

In sum, the District had a duty to complete an administrative investigation, and did so through its private investigator and counsel. It further had a duty to produce non-exempt portions of public records related to that investigation. The end result of the trial court's ruling is approval of the complete withholding of records related to a required administrative investigation on the basis that the District delegated the investigation to outside counsel and a private investigator. From this ruling, all public agencies are encouraged to shield all investigations into sensitive matters, those which, by definition, the public should be watching the most closely, by turning over the public agencies'

obligations to counsel. The policy of the Public Disclosure Act repudiates such affronts to open government.

3. The Public Disclosure Act's Controversy Exemption Applies Only Under Threat Or Reasonable Anticipation Of Litigation.

Public records are not exempt from disclosure under RCW 42.17.310(1)(j) unless the public agency establishes “completed, existing, or reasonably anticipated litigation.” *Dawson v. Daly*, 120 Wash.2d 782, 791 (1993); *see also Hangartner v. City of Seattle*, 151 Wash.2d 439, 449-50 (2004). In *Hangartner*, the Court affirmed the trial court’s finding that certain documents were not subject to the controversy exemption as the public agency failed to show any threat or reasonable anticipation of litigation, only a “litigation-charged atmosphere.” 151 Wash.2d at 450. Indeed, courts “have made clear that, because litigation can be anticipated at the time almost any accident occurs, a ‘substantial and significant threat of litigation’ is required” for material to constitute work product *Broadmax v. ABF Freight Systems*, 180 F.R.D. 343, 346 (N.D. Ill. 1998) (applying analogous federal rule). In *Broadmax*, defendant claimed the work product doctrine precluded production of certain documents created after an accident which resulted in death of plaintiff’s son, relying on the serious nature of the accident and that defendant immediately retained

counsel. *Id.* at 345-46. The court noted that retention of counsel is not dispositive, and when an event such as a fatal accident occurs, “litigation is likely to be anticipated.” *Id.* at 346. However, the court found that certain documents were not work product as the defendant had “purposes beyond defense of litigation in preparing investigatory documents. Such accidents necessitate in-house, ordinary-course-of-business investigative reports.” *Id.*

Here, the District relies entirely upon its counsel’s opinion that a claim against the District was immediately apparent after Nathan Walters’ death. However, litigation was never commenced; the Walters family and the District mediated and reached a settlement within three months of the incident. Stated differently, no claim was filed against the District, and even a “litigation-charged atmosphere” does not support application of the work product doctrine. As in *Broadmax* and as discussed above, the District was required to investigate even in the absence of litigation. As such, work product doctrine protection does not attach to the investigatory documents created by the private investigator and counsel and those documents, appropriately redacted to protect any legal theories or mental impressions of counsel, should be disclosed.

C. The Work Product Doctrine Is Not An Absolute Bar To Disclosure Where, As Here, The Public Has No Available Avenue To Discover Facts Relevant To An Agency's Decision.

1. The Public Disclosure Act Applies The Civil Rules Permitting Disclosure Of Work Product Where The Possibility Of Litigation Is Foreclosed And There Is No Other Reasonable Avenue To Obtain Discoverable Facts.

RCW 42.17.310(1)(j) exempts from disclosure "public records which are relevant to a controversy and which are the work product of an agency's attorney." *Limstrom v. Ladenburg*, 136 Wash.2d 595, 605 (1998). Washington courts follow the rules of pretrial discovery "to define the parameters of the work product rule for purposes of applying the exemption." *Id.* Thus, under the Public Disclosure Act, a citizen has the right to inspect records in an agency's attorney's file unless the requested "documents would not be available to a party under the discovery rules set forth in the civil rules for superior court..." *Id.* at 600-01.

Under Superior Court Civil Rule 26, a party may obtain documents prepared in anticipation of litigation if that party: (1) "has a substantial need of the materials in the preparation of his case"; and (2) "is unable without undue hardship to obtain the substantial equivalent of the materials by other means..." C.R. 26(b)(4). The work product doctrine,

therefore, is not an absolute bar to discovery. *See, e.g., Limstrom*, 136 Wash.2d at 610 (“[w]here relevant and non-privileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may properly be had...”), *quoting Hickman v. Taylor*, 329 U.S. 495, 510-12 (1947). Indeed, “[t]he clearest case for ordering production” under Rule 26(b)(4) arises when the information “is in the exclusive control of the opposing party.” *Heidebrink v. Moriwaki*, 104 Wash.2d 392, 401 (1985).

The Washington Supreme Court has adopted the dichotomy of “ordinary” work product versus “absolutely protected” work product. *See Limstrom*, 136 Wash.2d at 611-12. Under this distinction, mental impressions of an attorney and notes or memoranda prepared by an attorney from oral communications are absolutely protected from disclosure unless the attorney’s mental impressions are at issue. *Id.* However, facts gathered by an attorney can be disclosed if the requesting party has substantial need and cannot obtain the materials elsewhere:

The factual written statements and other tangible items gathered by the attorney and other representatives of a party are subject to disclosure only upon a showing that the party seeking disclosure of the documents actually has substantial need of the materials and that the party is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. Mental

impressions of the attorney and other representatives embedded in factual statements should be redacted.

Id., citing *Heidebrink*, 104 Wash.2d 392.

2. In The Context Of A Public Records Request, The “Substantial Need” Element Of Rule 26(b)(4) Does Not Require Open Litigation.

The *Limstrom* Court recognized that Rule 26 sets the appropriate standard as to whether work product could be disclosed in response to a public records request. 136 Wash.2d at 605-06. The District argues that Rule 26’s requirement of “substantial need” related to “preparation of [a party’s] case” bars disclosure absent pending litigation by the requesting party, other than the public records litigation. *The Spokesman-Review* does not have other pending litigation requiring disclosure of the records containing facts known only to the District. However, application of Rule 26 in the public records arena, when considered with the policy of presumed disclosure under the Public Disclosure Act, does not require that the party seeking disclosure be currently involved in litigation.

Rule 26(b)(4) contemplates disclosure to an adverse party who is preparing a case against the disclosing party. As such, the key phrase “substantial need” related to “preparation of [the party’s] case” underscores that the disclosure is appropriate in circumstances when a

party cannot fairly litigate absent access to work product prepared by the party's adversary. Disclosure would be permitted, therefore, where a party could not get those facts from answers to interrogatories, depositions, or other discovery mechanisms. Indeed, the second prong, discussed below, presupposes and requires that other discovery methods be unavailing of the relevant facts.

In a public records case, in contrast, there is no litigation in which the party making the request requires disclosure in order to fairly litigate. This did not, however, prevent the *Limstrom* Court from explicitly applying Rule 26 to public records act cases. A person making a public records request is not required to "provide information as to the purpose for the request..." RCW 42.17.270. The Legislature clearly determined that access to public records is a substantial need in lodging sovereignty in the people, not public agencies:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they created.

RCW 42.17.251. Indeed, "an informed public is the essence of working democracy." *Minneapolis Star and Tribune Company v. Minnesota*

Commissioner of Revenue, 460 U.S. 575, 585 (1983). Given the strong policy of the state supporting public disclosure of public records, a public records request, in and of itself, constitutes a “substantial need” for information.

3. The Spokesman-Review Has Demonstrated Substantial Need For The Information Gathered By The District’s Counsel And Private Investigator.

Assuming, for the sake of argument, that a person who requests public records must make an additional showing of substantial need for disclosure, *The Spokesman-Review* has demonstrated substantial need for the facts contained within the District’s records.

First, the District and Nathan Walters' family issued a joint press release when the District agreed to make a payment of nearly \$1 million in August of 2001 that referenced “inaccurate or incomplete” reports generated by the media, including *The Spokesman-Review*. C.P. 205, 323-324. *The Spokesman-Review*, therefore, has an obligation to itself and its readers to clarify whatever "inaccurate or incomplete reports" allegedly were published. Access to the facts as gathered by the District will allow *The Spokesman-Review* to publish more accurate and complete accounts of the incident.

Furthermore, the District approved a significant payment to the Walters family. This payment, which, though covered by the District's insurance, traces back to government funds. The public (and *The Spokesman-Review*, a member of the public) therefore has a right to understand the facts supporting the District's decision to settle and approve such a payment within only three months after the death of Nathan Walters.

In addition, *The Spokesman-Review*, as a media outlet, has an increased interest in disseminating complete and accurate information to the public about such events generating substantial public interest. A "basic assumption of our political system [is] that the press will often serve as an important restraint on government." *Minneapolis Star*, 460 U.S. at 585. The press serves an important function that allows the public to "acquir[e] knowledge of government activities." *Leathers v. Medlock*, 499 U.S. 439, 445 (1991). *The Spokesman-Review* therefore has an added need for access to government records so that the citizenry remains informed.

In sum, *The Spokesman-Review* need not justify its request for the information because the Public Disclosure Act protects citizens from stating their reasons for seeking access and the Act sets out the important

public purpose served by access. However, here, *The Spokesman-Review* does have a special need for access, both because of the public's substantial interest in understanding the facts that led to a significant settlement payment and because of the District's critique of media reports, including those published by *The Spokesman-Review*, as "inaccurate or incomplete." Moreover, *The Spokesman-Review* has an added obligation to disseminate information regarding the government in its watchdog role as the media.

4. The Spokesman-Review Has No Other Reasonable Avenue By Which To Obtain The Facts Regarding The Incident.

In *Limstrom*, the Court found that factual documents gathered by a prosecutor should not be disclosed pursuant to a public records request because the requesting party had already obtained the documents from other public agencies. 136 Wash.2d at 614-15. Prior to the trial court's hearing, the *Limstrom* plaintiff had received from other public agencies all of the documents that he expected to find in the prosecutor's file except for publicly available motions and offer sheets not before the Court for review. *Id.* at 614-15 (remanding to trial court to review offer sheets in camera).

In contrast to *Limstrom*, here, the requested records reside only in the files of counsel for the District. C.P. 207. *The Spokesman-Review* cannot obtain them from another public agency. While *The Spokesman-Review* ultimately spoke with parent chaperones who were on the field trip, it is not possible to determine whether the information provided to the newspaper is the same as the information contained in the records at issue. Moreover, all attempts by *The Spokesman-Review* to communicate with District employees were referred to attorneys for the District. C.P. 303. *The Spokesman-Review* therefore was denied any ability to recreate information gathered by the District through independent interviews.⁴

The District asserts that *The Spokesman-Review* cannot claim that it does not have access to the requested documents because *The Spokesman-Review* did not disclose to the District all facts it has obtained and which persons it attempted to interview. The District misses the point – *The Spokesman-Review* is not simply requesting records to find out what happened on the field trip, but instead is attempting to discover what facts the District knew when it entered into a settlement with the Walters family. Stated differently, the facts as known to the District is the

⁴ Here, litigation was never initiated relating to the incident. As such, no discovery records exist, which would have provided a route for public review and understanding.

information sought. In addition, the records at issue are not merely documents containing information that cannot be replicated, but also are a contemporaneous compilation of how a public agency performs its duties. As such, by definition, *The Spokesman-Review* cannot recreate the records through other avenues.

Moreover, merely being able to interview a witness to an incident is not the same as having access to a statement produced more contemporaneously to the time the incident occurred. *See Southern Railway Company v. Lanham*, 403 F.2d 119, 127 (5th Cir. 1968), *rehearing en banc denied*, 408 F.2d 348 (5th Cir. 1969). In *Lanham*, the court affirmed the trial court's order holding appellant railroad in contempt for failure to produce witness statements taken shortly after an accident. *Id.* at 126-129. The Fifth Circuit focused on the fact that the statements in question were taken soon after the incident, and required production even though the witnesses were available for deposition. *Id.* Here, as in *Lanham*, the District's investigation into the incident commenced almost immediately, and its records reflect the most contemporaneous recollection of those involved in the incident.

Indeed, the purpose of the Public Records Act would be defeated if a requester was required to duplicate the government's process in

assembling records. The costs of such effort, similar to defending against an injunctive and declaratory action as brought here by the District against *The Spokesman-Review*, would be so prohibitive as to defeat the policy of open disclosure of public records upon request. Members of the public should not be required to undertake efforts similar to the number of interviews and other fact-gathering activities conducted by the private investigator and counsel for the District as a prerequisite for disclosure pursuant to the Public Disclosure Act.

5. The District Will Not Be Prejudiced By Disclosure As It Can Redact Mental Impressions Of Its Counsel.

As discussed above, the District may redact portions of the records that reflect truly privileged communications or those which reflect the mental impressions of its counsel. As such, the District will not be prejudiced by disclosure.

In addition, the District will not be prejudiced by allowing *The Spokesman-Review* access to the requested records because the possibility of litigation related to the death of Nathan Walters is foreclosed by the settlement agreement. As noted above, a party to litigation may, in some circumstances, gain access to work product to prepare his or her case.

Here, the District faces no litigation and will not have facts gathered by its counsel and the private investigator used against it.

D. The Attorney-Client Privilege Is Not Synonymous With The Work Product Doctrine And Applies Only To Communications And Documents Recording Such Communications.

Contrary to the District's assertion, the attorney-client privilege and work product doctrine are not coterminous; though work product may also be subject to the privilege, it is not necessarily privileged by virtue of being work product. The attorney-client privilege applies only to communications between an attorney and his or her client and documents recording such communications:

[T]he attorney-client privilege is a narrow privilege and protects only 'communications and advice between attorney and client;' it does not protect documents that are prepared for some other purpose than communicating with an attorney. Thus, should an agency prepare a document for a purpose other than communicating with its attorney, and then claim that the document is protected by the attorney-client privilege, the requesting party might well claim that the agency has acted in bad faith.

Hangartner, 151 Wash.2d at 452 (internal citations omitted); *see also Pappas v. Holloway*, 114 Wash.2d 198, 203 (1990), *citing Kammerer v. Western Gear Corp.*, 27 Wash.App. 512, 517-18 (1980), *aff'd* 96 Wash.2d 416 (1981). The attorney-client privilege is strictly construed, and the

burden to prove the privileged nature of the documents lies with the party asserting the privilege. *See Pappas*, 114Wash.2d at 203-208; *Dietz v. Doe*, 131 Wash.2d 835, 844 (1977).

The limited application of the privilege corresponds with the absolute bar to production of documents that fall within the privilege. Here, *The Spokesman-Review* does not seek materials that are protected by the attorney-client privilege, *i.e.*, communications between the District and its counsel. However, the District admittedly was not provided with any of the documents requested. *See* C.P. 161, 207. As such, these documents cannot constitute “communications” within the scope of the privilege. At the very least, any documents that may contain portions of privileged communications should be produced in redacted form, as noted above.

E. The District Waived Any Claims Of Attorney-Client Privilege Or Work Product Through Its Extensive Discussion Of Its Strategies And Preparation For Mediation.

The District discusses at length its counsel’s understanding of their role from the initial contact with the District after the Nathan Walters incident. Testimony establishes that counsel considered the implications of Washington negligence law, wrongful death regarding a minor child, insurance coverage, application of attorney-client privilege and work product doctrine, dealing with the media, conflict-of-interest issues, and

liability defenses regarding District nurses, employees, parent chaperones, contributory fault of Nathan Walters or his parents, and issues regarding proximate cause. *See, e.g.*, Response Brief, pp. 56-57. Counsel specified the legal research conducted, as well as work on potential expert witnesses. *Id.*, p. 57. Indeed, the District has detailed step-by-step the actions taken and conversations had between counsel and the District. For example, the District spelled out Dr. Anderson's initial communication to Mr. Manix regarding the incident. The District discussed the subjects contained in that telephone call, including Mr. Manix's assessment of the likelihood of a wrongful death claim, the application of negligence law to District employees and a parent volunteer, Washington wrongful death law and survival action damages regarding the death of a minor child. *See* C.P. 385-87, 517. The District continued to explain subsequent conversations between Dr. Anderson and Mr. Manix, detailing the subjects discussed, including various legal theories. C.P. 387-89; C.P. 517. Indeed, the Response Brief contains over twenty pages of facts that show that the District's counsel truly believed they were giving legal advice to

the District.⁵ This testimony waives any claim of protection under attorney-client privilege and/or work product. *See, e.g., Robinson v. Tex. Auto Dealers Assn.*, 214 F.R.D. 432, 445 (E.D. Tex. 2003) (proponent of claim of privilege must show that communications at issue “not only were intended to be kept confidential, but that they were, in fact, kept confidential”).

Simply stated, the District cannot have it both ways. The District cannot defend itself to this Court through detailed explanation by its attorneys as to their purportedly justifiable fear of litigation (including the applicable legal theories and defenses considered and discussed with the District), as well as selectively disclose facts and information to the public that can only come from the requested records, and simultaneously claim that those same conversations and records are exempt from disclosure. As detailed in *The Spokesman-Review*'s opening brief, the District's press conferences disclosed information that could only have been gathered from the investigation conducted by the private investigator and counsel. *See* Appellant's Brief, pp. 42-43 (detailing information released at press

⁵ Further, the District's original Brief, rejected on the grounds of overlength by this Court, included almost fifty pages of facts and information, including more of the same testimony by counsel that underscores counsel's understanding of the situation and the nature of discussions between counsel and the District.

conference). The District now claims, without citation to the record, that those facts were “were the very same preliminary information concerning the incident that had been initially reported to the District, independent from and prior even to counsel’s involvement.” Response Brief, p. 62. However, absent access to the records, the public and *The Spokesman-Review* are unable to determine when those facts were discovered and what the District knew when it entered into the settlement.

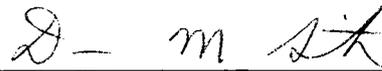
Moreover, the District seems to have exchanged documents with the Walters family. See Response Brief, p. 57 (counsel “communicated with counsel for the Walters and discussed informal document discovery”). Disclosing documents to an adverse party under an “informal” agreement waives any claim to work product or attorney-client privilege, even if the parties later mediated and entered into a confidentiality agreement. See *In re Chrysler Motors Corp. Overnight Evaluation Program Litigation*, 860 F.2d 844, 846-847 (8th Cir. 1988); see also *Grumman Aerospace Corp. v. Titanium Metals Corp. of America*, 91 F.R.D. 84, 90 (E.D.N.Y. 1981) (“[d]isclosure to an adversary waives the work product protection as to items actually disclosed, even where disclosure occurs in settlement”); *In re Worlds of Wonder Securities Litigation*, 147 F.R.D. 208, 210-211 (N.D. Cal. 1992).

III. CONCLUSION

For the reasons set forth above and in its opening brief, *The Spokesman-Review* requests that the Order of the trial court granting summary judgment and denying access to the requested public records be reversed and an Order be entered requiring the Spokane School District No. 81 to make available for public inspection the requested documents.

RESPECTFULLY SUBMITTED this 20th day of April, 2005.

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CERTIFICATE OF SERVICE

On the ^{7th} ~~20~~ day of April, 2005, I served the within document described as **REPLY BRIEF OF APPELLANT** on all interested parties to this action as follows:

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Shelly M. Koegler