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No. 231364

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

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

Respondents.

v.

COWLES PUBLISHING COMPANY, a Washington corporation,

Appellant,

**BRIEF OF RESPONDENT
SPOKANE SCHOOL DISTRICT NO. 81**

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PAUL E. CLAY, WSBA No. 17106
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I. SCHOOL DISTRICT'S STATEMENT OF THE CASE

When a communication is confidential and concerns contemplated or pending litigation..., **the necessity for the attorney-client privilege exists as between a public agency and its lawyers to as great an extent as it exists between other clients and their counsel.**

Settlement and avoidance of litigation are particularly sensitive activities, whose conduct would be grossly confounded, often made impossible, by indiscriminating insistence on open lawyer-client conferences. In settlement advice, the attorney's professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears. **If the public's 'right to know' compelled admission of an audience, the ringside seats would be occupied by the government's adversary, delighted to capitalize on every revelation of weakness.** . . . Frustration would blunt the law's policy in favor of settlement, and financial imprudence might be a compelled path.

Port of Seattle v. Rio, 16 Wn.App.
718, 725, 559 P.2d 18 (1977)

Based on the virtual mountain of uncontradicted evidence submitted below, the trial court properly found that Spokane School District No. 81 had shown cause that each of the documents at issue is either a “classic” attorney-client privileged communication or a work product document, or both, and that summary judgment in the School District’s favor was compelled by the “controversy” exemption to the Public Records Act at RCW 42.17.310(1)(j). Further, the trial court properly found that as to any

document that might “only” be protected as “ordinary” work product, Cowles had not and could not make a factual or legal showing sufficient to invade that work product.

The Court will learn by this Brief and the evidence cited within it that the tragic death of young Nathan Walters presented an attorney-client privilege and work product doctrine scenario that was extremely unique and absolutely clear-cut. Literally within minutes of Nathan’s death, the School District’s chief legal officer and its superintendent anticipated substantial wrongful death claims would be asserted. That anticipation was not only actually subjectively held, it was manifestly objectively reasonable. The District’s legal officer therefore, as a prudent public steward, involved both the District’s general counsel and its “standing” insurance defense counsel, who immediately anticipated that the eventuality of such claims was indeed a near certainty. They therefore acted immediately to formulate defenses to those anticipated claims (which indeed became actual claims within just a few days of Nathan’s death) for the protection of not only the School District but six persons who faced the potential of personal, individual liability – five District employees and one student’s parent who, by gracious volunteerism but awful happenstance, found herself embroiled in the center of this tragedy.

This unique scenario created what Cowles Publishing characterizes as a tension between competing interests. On the one hand, Cowles' stated interest is to publish further news articles for a readership that allegedly desires to know more about "what happened" to Nathan. Cowles simply cannot believe that the District and those five employees and the parent volunteer would stand up for the important public policy purposes underlying the attorney-client privilege and the work product doctrine, at the risk of angering Cowles and potentially thereby its readership – the District's bond and levy constituency.

On the other hand, the interests of the School District, those employees, and the parent volunteer, arise from the fact that when faced with the specter of substantial entity and/or individual liability judgment(s), they desired to work in complete candor with their attorneys to mount their defenses without fear that their most intimate privileged communications and work product materials would be disclosed to citizens, to the media, or indeed to the adverse party, for the mere cost of a postage stamp and a one-sentence Public Records Act request.

While the School District concedes the existence of a political tension between these competing interests, there was below and is now no legal tension whatever between them. Our Legislature dictated, in the plainest of terms by RCW 42.17.310(1)(j), precisely how any such tension

must be here resolved. The legislative directive was and is that Public Records Act obligations must yield to the compelling purposes advanced in our adversarial judicial system by the attorney-client privilege and the work product doctrine, and a public agency's document disclosure obligations therefore have to stop at the figurative handle of the filing cabinet where the most intimate of such materials are kept. However frustrating that mandate by our elected representatives may be for Cowles Publishing Company in view of its extreme philosophical bent, it is one that is dictated by the plain and wise public and statutory policy of this State.

II. STATEMENT OF FACTS

The facts below constituted a virtual mountain of evidence that if there ever were a set of documents falling within the protection of the attorney-client privilege and work product doctrine, the documents here at issue are it.¹

¹ The School District and Mr. Manix's and Mr. Clay's six individual clients submit that the documents at issue, themselves, by their nature and content, alone constitute conclusive evidence that they are "classic" work product and attorney-client privileged materials (as the trial court found, CP 760), and were prepared for no purpose other than defense against initially anticipated, and then actual, claims. The documents were therefore submitted to the trial court by the School District on an *in camera* basis, and were reviewed by the trial court as such. *See* CP 759-760.

After Cowles' appeal to this Court and failure to designate the *in camera* documents in its Designation of Clerk's Papers, the District sought and obtained an Order from the trial court by which the documents were transmitted to this Court for *in camera* review on this appeal. The documents in that format are individually tabbed as 1 through 75. The District will therefore, herein, continue with the same citation protocol for those documents that it used below, by citing a given document according to the numbered tab that corresponds to that particular document. Additionally for this Court's

As of the incident involving Nathan on May 18, 2001, the law firm of Winston, Stevens, Clay & Hansen, P.S. (“the WSCH firm”) had for many years continuously served as general legal counsel to the School District. It was as well the District’s “standing” insurance defense counsel through The Hartford Casualty Company. As of that time, typically, when the School District received notice of an occurrence of an incident that either it or the WSCH firm assessed as being likely to generate a claim against the District, or when a new claim or suit was brought against the District, the WSCH law firm would initiate defense efforts on behalf of the District. This was so even during any interim time period while Hartford’s formal designation of the WSCH law firm as “insurance defense” counsel was pending relative to that particular incident, claim, or suit. CP 380-84, 551, *see also, generally*, CP 515-22, 523-28, 535-40.

As of that same date Mark Anderson, Ph.D. was the District’s Assistant Superintendent for Management Services. In that position Dr. Anderson was one of only three persons within the District who reported directly to the District’s Superintendent, Gary Livingston, D.Ed., and Dr. Anderson was the District’s chief official responsible for managing all legal matters involving the District, including personal injury exposures the District faced or might face. In that role Dr. Anderson had worked

convenience, an index to the records that was provided by the District to Cowles, and which appears in the record at CP 70-85, is attached as Appendix “A” to this Brief.

extensively with the WSCH law firm and Hartford in defense of numerous tort claims against the District. CP 386, 515, 523.

At approximately 3:45 to 4:00 p.m. on the afternoon of Friday, May 18, 2001, Dr. Anderson received a phone call conveying tragic information from Larry Parsons, who was a District administrator responsible for Logan Elementary School, which was owned and operated by the District. Mr. Parsons told Dr. Anderson the following:

- A Logan third-grader, Nathan Walters, had been on a field trip with his class earlier that afternoon to a farm in the Green Bluff area;
- Nathan had a peanut allergy, which was previously known to the school staff;
- The District had provided sack lunches for all of the children on the field trip, and despite Nathan's allergy, all of the lunches had included a peanut butter sandwich, trail mix with peanuts, and a peanut butter cookie;
- Nathan had eaten at least a part of the lunch, including at least part of the peanut butter cookie, and had reported feeling ill;
- Nathan's teacher, who was aware of Nathan's allergy, had been made aware that Nathan had eaten a peanut product and was not feeling well; the teacher had monitored Nathan's condition during the period the field trip activities were finished by the other students, and had enlisted another student's parents, who was along on the trip as a volunteer chaperone, to also monitor Nathan's condition;
- Nathan was placed on the school bus, which was parked at the farm, for the remainder of the field trip;
- Nathan's condition dramatically worsened on the way home from the field trip, and he had been diverted to Holy Family Hospital;

- Although Mr. Parsons had received some differing reports as to Nathan's condition from school personnel who had also gone to the hospital, it appeared to be the case that Nathan had passed away;

CP 516-17.

With this information Dr. Anderson immediately assessed there was a probability the District would face a wrongful liability death claim. He immediately relayed the information to Dr. Livingston. Dr. Livingston, too, immediately assessed that the District would likely face a wrongful death suit based on the incident. Dr. Livingston therefore confirmed that Dr. Anderson intended to contact attorneys John Manix and Paul Clay of the WSCH firm, immediately, for advice as to how the District should proceed from the standpoint of defending such an anticipated suit. CP 517, 523-24.

Dr. Anderson then did immediately telephone the WSCH firm, and was put through to Mr. Manix. He relayed to Mr. Manix the information Mr. Parsons had provided. CP 385, 517. Contemporaneous with Dr. Anderson's report of this information, Mr. Manix – who had significant experience representing school districts in tort matters – independently assessed that the likelihood of a wrongful death negligence claim as not only probable, but a “near certainty.” CP 385-87, 517.

Mr. Manix therefore, in that very first phone conversation with Dr. Anderson, initiated a conversation with Dr. Anderson that Mr. Manix

testified fulfilled every conception he has of a “pure” occasion of an attorney providing legal analysis and advice to his client in anticipation of litigation. In that first conversation within minutes of Nathan’s reported death, Mr. Manix provided Dr. Anderson his views on such subjects as how negligence law might be applied to the conduct of District personnel and the one parent volunteer; of Washington wrongful death and survival action damages law in the context of the death of a minor child; and the role Mr. Manix foresaw Hartford playing with respect to the claim they were anticipating. CP 386-87, 517.

Dr. Anderson cut short this initial conversation with Mr. Manix to take another call. He then called Mr. Manix again within five minutes. In that second conversation, Dr. Anderson advised he had just received official confirmation that Nathan had died. After engaging in some reflections that were more personal than legal in nature, Mr. Manix proceeded to recommend a variety of options and actions to protect the District’s interests against an anticipated wrongful death claim. This discussion concerned investigation of facts that Mr. Manix anticipated might bear on the liability issues he was then speculating might end up at issue. They discussed particular persons who, based on their positions with the District, would need to be interviewed by the WSCH firm for defense purposes. They also discussed documents that might be relevant to a liability claim.

As he intended to begin review of documents for defense purposes the very next morning (Saturday, May 19), Mr. Manix requested that Dr. Anderson have someone within the District begin collecting particular documents for his review related to Nathan's peanut allergy, the District's level of awareness of Nathan's allergy, food-ordering documentation related to the field trip, and the District's food allergy policies and procedures. CP 387-88.

In that second phone conversation between Mr. Manix and Dr. Anderson within minutes of Nathan's death, Mr. Manix also specifically discussed with Dr. Anderson the precise subject of how the attorney-client privilege and work product doctrine principles would apply to his firm's investigation of the incident. Mr. Manix provided advice on how responses to media inquiries might be handled, as he had concerns that any inaccurate statement of fact made by a District official based on preliminary information might later be used by counsel for Nathan's family as an admission by the District in a claim setting (indeed, all three local news channels ran stories on Nathan's death that evening, and indeed, one interrupted its regular programming to do so). Further on that subject, Mr. Manix specifically provided advice to Dr. Anderson on the subject of vigilance in maintaining as confidential the fruits of the investigation that his firm was about to embark upon concerning Nathan's death. Mr. Manix

testified below this was because he had concerns that if counsel for Nathan's family could establish a waiver of the attorney-client privilege or the work product doctrine, that would significantly enhance the District's financial exposure on the tort claims he and Dr. Anderson were then anticipating.² CP 388-89, 517.

Later that same Friday evening, Dr. Anderson also spoke with Paul Clay of the WSCH firm. Upon learning the initial facts that Mr. Parsons had reported to Dr. Anderson that afternoon, Mr. Clay also – based on his experience solely representing school districts for some 12 years (as of that time) – anticipated to a “near certainty” that a liability claim would be made. CP 553. Additionally that evening, Mr. Manix and Mr. Clay spoke. They discussed the need for them to immediately begin interviewing witnesses, and the possibility of retaining a private investigator to assist them with those interviews given out-of-town plans that Mr. Manix had and Mr. Clay's relative unavailability for that coming week. CP 389-90, 551.

The next two days, Saturday, May 19 and Sunday, May 20, 2001, numerous meetings and phone conversations occurred related to the incident, variously between Dr. Livingston, Dr. Anderson, Mr. Clay, and

² Mr. Manix's discussion with Dr. Anderson, particularly the portion concerning attorney-client privilege and work product doctrine matters, in that second conversation of May 18, 2001, was specifically corroborated by Mr. Manix's legal-fee billing entry for that date to the District. It stated: “TELEPHONE CONFERENCES WITH CLIENT RE LOGAN TRAGEDY; INVESTIGATION RE FACTS; STRATEGY RE WORK PRODUCT, ATTORNEY/CLIENT PRIVILEGE AND INVESTIGATION.” CP 389.

Mr. Manix. Further, Mr. Manix and Mr. Clay engaged in initial document review and information-gathering pertaining to the incident. Based on their work through that weekend, Mr. Manix and Mr. Clay had by the end of the weekend developed a rough variety of preliminary liability defense theories on subject matters such as:

- (1) whether the District's nurses had properly trained Nathan's teacher to respond to any allergic reaction involving Nathan;
- (2) whether the actions taken by the District's employees and the volunteer parent chaperone on the field trip had been prudent, in the context of the information they possessed and their observations of Nathan's condition while they were monitoring him;
- (3) whether Nathan himself might have some contributory fault for eating the peanut product;
- (4) whether Nathan's ingestion of the peanut product was in fact the medical and proximate cause of Nathan's death;
- (5) whether there was another person, not in an employment or volunteer capacity with the District, and not one of Nathan's parents, who might have liability for the incident; and
- (6) whether Nathan's parent(s) might have liability based on information or lack of information provided to the District.

Mr. Manix and Mr. Clay discussed their theories with Dr. Anderson over that weekend, again in a manner that Mr. Manix describes as "pure" attorney-client communications. CP 390-91, 551, 553, 517-19.

Also over that weekend, Mr. Clay provided Dr. Livingston and Dr. Anderson further recommendations concerning dealing with the media and

protecting insurance coverage for the anticipated claims. Mr. Clay discussed with them an insured party's risk of jeopardizing insurance coverage by making statements that might constitute an admission of liability. Mr. Clay also particularly discussed with Dr. Livingston and Dr. Anderson the need to maintain the information and documents that were being generated in the course of his office's investigation of Nathan's death in confidence, specifically in the context of the work product doctrine. Dr. Anderson and Dr. Livingston specifically testified to the fact and substance of these discussions with Mr. Clay, and his description of the purpose and scope of the doctrine.³ CP 518, 519, 525, 526, 554-55.

Over the course of that weekend, Dr. Livingston told Mr. Manix and Mr. Clay to postpone witness interviews until Monday, to give persons involved in the incident the weekend to deal with the tragedy before being disturbed by the legal process. Because of that and because of Mr. Manix's out-of-town travel plans for that following Monday and Tuesday and Mr. Clay's full upcoming schedule, it was decided that the WSCH firm would retain a private investigator to assist them in witness interviews to commence Monday morning. CP 391, 517-18, 524-25, 555-56. Mr. Clay

³ They indeed specifically recall Mr. Clay discussed the subject of how public officials, while owing certain disclosure obligations to their constituency, also concurrently owe obligations to that same constituency to take all appropriate steps – including invocation of the work product doctrine – to vigorously defend their agencies and therefore the public trust from litigation exposures. CP 518, 519, 525, 526, 554-55.

therefore contacted private investigator David Prescott, at his home, that Sunday evening. He described in general terms the background of the case and the work he and Mr. Manix needed Mr. Prescott to do. They discussed the level of concern Mr. Clay had relative to the probability that a wrongful death claim would be brought against the District. They discussed that if Mr. Prescott took on the work, it could end up involving interviews of multiple persons, and that it was critical for those interviews to commence the next day. Mr. Prescott agreed to be retained.⁴ CP 555-56, 536.

That Monday morning three days after the incident, Mr. Prescott did begin his interviews, as instructed by Mr. Clay. Mr. Prescott reported back to Mr. Clay after those first interviews, and based on that information, the list of witnesses Mr. Clay and Mr. Manix wanted interviewed grew. This ended up being the typical pattern for the work Mr. Prescott conducted for Mr. Clay and Mr. Manix over the next approximately four weeks concerning the matter. Mr. Prescott worked precisely and only at the

⁴ In this conversation Mr. Clay further shared with Mr. Prescott his and Mr. Manix's legal and factual theories as of that time, in terms of the strengths and weaknesses that they preliminarily believed would exist in the context of a liability lawsuit concerning the incident. Mr. Clay identified the witnesses he wanted interviewed first, his understanding of each of those witnesses' roles in the events of Nathan's death, and how each person was situated relative to his views of the different liability issues of the case, as he had explained them to Mr. Prescott. Mr. Clay gave Mr. Prescott examples of questions and a description of the type of information he wanted from each person Mr. Prescott was to interview. Mr. Clay directed Mr. Prescott to check in with Mr. Clay or Mr. Manix, after each of the interviews, to report on the information he had learned and to discuss whether that information might prompt a need to interview different persons or otherwise change Mr. Clay's and Mr. Manix's investigation plans. Mr. Clay told Mr. Prescott to take notes of the interviews and to provide the notes to him or Mr. Manix for their review. CP 536, 555-56

direction of Mr. Clay and Mr. Manix – and no one at the District, and he reported only to them – and to no one at the District. After an interview or set of interviews was concluded, Mr. Prescott would check in with Mr. Clay and/or Mr. Manix, provide them his interview notes, and they would confirm the identity of the next person or persons they next wanted him to interview. Mr. Manix and Mr. Clay additionally discussed with Mr. Prescott, in detail, why certain information from a given interviewee or potential interviewee was important to their assessments as to the legal and factual issues presented by the claims that they at first were anticipating, and which, as discussed below, by the middle of the first week after Nathan’s death, were actually received. CP 394-95, 556, 536-37, 538.

Mr. Manix did proceed with his out-of-town travel plans that Monday. However, he communicated with his office concerning the matter while out of town. On that Monday he telephoned an associate in his office for confirmation, by the associate’s review of the District’s Hartford insurance policy, that any District employees or volunteers who were subject to the potential for suit as defendants in their respective individual capacities would be covered under the Hartford policy. Such coverage was confirmed by that research. CP 391-92.

While Mr. Manix was out of town, on Monday and Tuesday, May 21 and 22, 2001, he and Mr. Clay discussed by telephone the “individual”

insurance issue under the Hartford policy, in the context of hypothetical conflict-of-interest issues for the WSCH firm. This concern arose because Mr. Manix had been advised by the investigator, Mr. Prescott, that Nathan's teacher had been reluctant to submit to an interview due to fear that the District might impose discipline on him based on the incident. The WSCH firm had, as general counsel to the District, traditionally represented the District adverse to employees and unions in any disciplinary proceedings. On the other hand, Mr. Manix knew his firm would be designated by Hartford to not only represent the District against the wrongful death claim that was being anticipated, but as well, any individual employees who might be subject to individual suit. CP 392-94, 552, 557.

Mr. Manix and Mr. Clay discussed this potential conflict at that time and agreed it either was not a true conflict, or if it was a conflict, it was resolvable for several reasons. Principal among these was their determination that in the event any discipline was ever imposed on a District employee based on the incident, they would advise the District and the employee that their firm could not represent the District in any proceedings involving that employee.⁵ CP 392-94, 552.

⁵ The other reasons for Mr. Manix's and Mr. Clay's conclusions concerning the conflict of interest issue are discussed extensively in the record. CP 392-94, 552. Probative here, however, is the fact that their consideration of the issue establishes they were anticipating litigation against the District and individual employees at that stage. Had they not been, conflict of interest concerns would never have been raised.

Mr. Manix returned from his travel and was back in the office on Wednesday, May 23, 2001. On that date he and Mr. Clay had a speakerphone discussion with Spokane personal injury attorney Bruce Nelson, who had already been identified in media reports as having been retained by Nathan's parents in connection with the incident. In that phone conversation Mr. Nelson confirmed his representation of the Walters and that they did intend to make a wrongful death claim against the District. Thus, the claim that had been anticipated since within minutes of Nathan's death became an actual claim within only five calendar days, and only three business days, of Nathan's death. (A few days later, Mr. Nelson sent the WSCH firm a formal letter of representation). CP 385, 395, 426-27, 552.

During the three days at the conclusion of that first work week following Nathan's death, Wednesday, Thursday, and Friday, May 23 through 25, 2001, Mr. Manix, Mr. Clay, and Mr. Prescott at their direction, continued to engage in defense of what was by then an actual claim. This defense work included:

In fact Mr. Manix testified below that the specific reason he felt these individual-insurance-coverage and conflict-of-interest concerns needed to be addressed at that early moment was that he wanted to assure interviews of certain of the District's employees (and of the parent volunteer) who were subject to potential personal suit would be protected by the attorney-client privilege and/or work product doctrine. In fact, Mr. Manix's billing entry for Tuesday, May 22, 2001 corroborates that such analysis occurred on that date: "ANALYSIS RE WORK PRODUCT AND ATTORNEY CLIENT PRIVILEGE ISSUES RE INVESTIGATION; STRATEGY RE INVESTIGATION." CP 394, 428-39.

- review of new documents that had been gathered related to the health care plan that District nurses had had in place for Nathan prior to the incident;
- legal research on damages elements available;
- research to identify potential Ph.D. and physician witnesses for consulting and testimonial purposes, and actual conversations with such potential experts;
- meetings and phone discussions between Mr. Manix and Mr. Clay and Mr. Prescott, to learn the information Mr. Prescott had gathered from his interviews and to provide him directions as to the particular persons counsel wanted him to interview next, along with the particular information counsel wanted him to obtain from each such persons.

CP 394-96, 428-39, 552, 536-37. That this tort-claim defense work occurred was corroborated below by Mr. Manix's billing statements for the time period. CP 428-39.

Earlier in that same week after Nathan's death, Mr. Manix had given instructions that the District's insurance broker put Hartford on notice of the incident by a facsimile transmission. However as of Thursday of that week, May 24, 2001, the WSCH firm had not yet heard confirmation from Hartford that it had received notice of the incident. Mr. Manix therefore telephoned and left a phone message with a "large loss" claims specialist he knew at Hartford's office in Oregon, John Dill. Mr. Dill returned that phone call the next day, Friday, May 25, 2001. Mr. Manix discussed with him the background of the incident at significant length and requested an

accelerated liability insurance coverage acknowledgment, not only as to the District, but as to certain of the District's employees and the one particular parent volunteer from the field trip. Mr. Manix told Mr. Dill that he and Mr. Clay were planning meetings with these individuals and wanted to give them assurances that they would be covered, individually, under the Hartford policy, and that their firm would be designated to defend each of those persons, individually. Mr. Dill advised he would do what he could to accelerate Hartford's coverage review for the benefit of the District and the employees and the one parent volunteer at issue.⁶ CP 396-97.

Over the next several days, Mr. Manix, Mr. Clay, and Mr. Prescott at their direction, continued to work on potential defenses. Among other defense work for the matter, their billings corroborate in-office conferences with Mr. Prescott to report on the results of interviews he had been requested he conduct; conferences with consulting experts; Mr. Manix's and Mr. Clay's preparation of an incident chronology to forward to Hartford, along with an initial liability and damages exposure evaluation that Mr. Manix was preparing for Hartford; and discussions with Mr. Nelson regarding informal discovery of documents. During this period Mr.

⁶ Additionally in that conversation, Mr. Manix and Mr. Dill discussed the steps that the WSCH firm had already taken in defense of the claims, including Mr. Manix's and Mr. Clay's retention of Mr. Prescott to assist them with inter-views and the firm's efforts to retain expert witnesses. Mr. Dill advised that he approved of all of those steps and that once coverage was confirmed, he would have no objection to Hartford incurring the expenses of Mr. Prescott's investigation fees and those of the expert witnesses. CP 397.

Manix again spoke with Mr. Dill, and Mr. Dill confirmed that coverage under the Hartford policy had “cleared” review insofar as the School District, as well as the potential individual defendants District employees and parent volunteer, were concerned. CP 396-97, 552.

As of the following Wednesday, May 31, 2001, i.e., within 12 days of the incident and one week of Mr. Manix’s first conversation with Mr. Dill, Mr. Manix did complete his initial defense counsel liability and damages evaluation report for Hartford, and forwarded it to Mr. Dill by facsimile along with the preliminary chronology that Mr. Clay and Mr. Manix had been preparing for Mr. Dill. CP 397-98, 552. This report, attached to the *In Camera* Submission as Document No. 54, can leave no doubt as to the claim-defense purpose of the work performed by Mr. Manix, Mr. Clay, and Mr. Prescott, at their direction, to that date.

As noted, within a few days of the incident Mr. Manix and Mr. Clay had determined that six different persons were potential individual defendants to a wrongful death lawsuit because of their involvement in the events. These six persons were:

- Kathe Reed-McKay, R.N., Lonnah Heimstra, R.N. and Linda Bordwell, R.N. each of whom had been District-employed school nurses for Nathan and who, who, in consultation with Nathan’s father, had prepared an Emergency Care Plan for Nathan in the event of an allergic reaction, and who had trained the Logan staff, including Nathan’s teacher to how to respond in the event of such a reaction by Nathan;

- Ladd Smith, Nathan’s teacher, and the other Logan third-grade teacher, Heidi Dullanty, who were the two District employees on the field trip; and
- Ms. Mary Patterson, L.P.N, who was the parent volunteer on the field trip who had been enlisted to monitor Nathan’s symptoms after he had reported having eaten part of the cookie and not feeling well.

CP 398, 557-58. Mr. Manix and Mr. Clay (with the exception of Ms. Bordwell, who Mr. Manix alone interviewed) did proceed to interview those six persons, one interviewee at a time. At the commencement of each of those interviews, Mr. Manix made an introductory statement per an outline he had prepared for the first interview (with Kathe Reed-McKay, R.N.) concerning attorney-client privilege.⁷ By this introductory statement, Mr. Manix advised each of these persons:

- that by his and Mr. Clay’s experience and assessment, he or she was at potential risk of being sued in his or her individual capacity based on the incident, along with the District;
- that, however, the District’s substantial primary and excess liability insurance policies would protect them, individually, if they were sued individually;
- that his firm was representing the District with respect to the incident; and
- that at Hartford’s expense his firm also had been designated by Hartford to represent the person’s interests, individually, with respect to the incident.

⁷ The outline Mr. Manix used at the commencement of each such interview is included in the *In Camera* Submission, after his notes of the Reed-McKay interview, i.e., the last page of Document No. 47.

Mr. Manix also then specifically advised each person that if he or she chose to discuss the matter with he and Mr. Clay, all communications between them related to the incident would be protected by the attorney-client privilege. On each occasion, after these introductory statements, each of these persons indicated an understanding and appreciation that their discussions with Mr. Manix and Mr. Clay would be protected by the attorney-client privilege, and did proceed to speak with them. CP 398-99, 453-55, 552, 543-44, 547-49, 512-14, 532-33, 529-31; *see also In Camera* Submission at Document Nos. 46-50, 55-56; 67-70. Further, each of these persons testified below that had they not received Mr. Manix's assurances that he and Mr. Clay were representing them in their individual capacities and that their communications would be protected by the attorney-client privilege, they may have chosen not to speak with Mr. Manix or Mr. Clay at all, or if they had so chosen, they would have been much less willing to share with Mr. Manix and Mr. Clay all of the information that they did end up sharing with them. CP 455, 512-14, 530-31, 533-34, 544-45, 548-49, 454-55.⁸

⁸ In the days following the incident and prior to meeting with Mr. Manix and Mr. Clay, the two teachers involved in the incident had retained legal counsel – Mr. Smith retained attorney William Powell and Ms. Dullanty retained attorney Sheryl Phillabaum. When Mr. Manix and Mr. Clay requested a meeting with Mr. Smith, Mr. Powell expressed his desire to be present at the interview. Therefore, for the specifically-articulated purpose of removing any doubt that an attorney-client privilege would protect their discussions with

Thereafter, in mid- to late-June, 2001 – only some four weeks after the incident – Mr. Manix and Mr. Clay began settlement discussions with Mr. Nelson. An agreement was reached to have the matter mediated by Spokane attorney John Riseborough, and Mr. Prescott was therefore instructed by Mr. Manix to suspend his work at that point because the parties were going to attempt a settlement. CP 401; 538.

The mediation ultimately was held on August 14, 2001, less than three months after Nathan's death. Prior to the mediation, Mr. Manix prepared a confidential mediation Memorandum, which was circulated only to Mr. Riseborough, Dr. Anderson, and the District's liability insurance representatives. (That mediation memorandum is Document No. 75 attached to the *In Camera* submission.) At the mediation, Mr. Riseborough

Mr. Smith, Mr. Manix and Mr. Clay and Mr. Powell entered a joint representation agreement with respect to the incident. That agreement was reached after Mr. Powell requested, and was provided, a copy of the Hartford insurance policy to confirm it covered Mr. Smith, individually; a representation from Mr. Manix and Mr. Clay that their firm had been retained by Hartford to provide individual representation to Mr. Smith, along with the District; and a representation by Mr. Manix and Mr. Clay that the WSCH firm had committed not to represent the District in the event that any discipline was ever imposed by the District on Mr. Smith. CP 399-400, 512, 552, 547.

For her part, Ms. Phillabaum similarly wanted to attend Mr. Manix's and Mr. Clay's interview of Ms. Dullanty. Consequently and similarly, prior to their interview of Ms. Dullanty, Mr. Manix and Mr. Clay reached an agreement with Ms. Phillabaum as to such joint representation. CP 399-400, 552, 547, 512

Mr. Manix's and Mr. Clay's dealings with Mr. Powell and Ms. Phillabaum, specifically in the context of discussions about assuring that the attorney-client privilege was maintained with respect to interviews of Mr. Smith and Ms. Dullanty, are corroborated by numerous entries in their billings for that time period, for example at CP 440-46, *see, e.g.*, Mr. Manix's entries for May 30, May 31, June 4, June 7, June 12, June 19, and June 20, 2001.

asked the persons in attendance to sign a mediation agreement. This was done. CP 401-02, 447-49.

The mediation was successful. The matter was therefore settled within three months of the incident. Within approximately one week of the mediation, a formal written settlement agreement was executed. CP 401-02. (A copy of that Settlement Agreement is Document No. 1 to the *In Camera* submission.⁹)

As of the mediation, and then as of execution of the formal settlement documents, which as mentioned occurred within one week of the mediation, the WSCH firm had not completed its investigation of the incident and no “report” based on that firm’s investigation of the incident (at least that was ever intended for circulation outside the attorney-client privilege) had been authored by that firm or office or anyone on behalf of the School District.¹⁰ CP 401-02, 553.

⁹ The School District has never taken the position that the Settlement Agreement or the original incident report prepared by the School District, Document Nos. 1 and 2 to the *In Camera* Submission, were protected by the attorney-client privilege or the work product doctrine. Rather, the Walters contended those documents were protected by student confidentiality and health-care record confidentiality laws. As noted by Cowles in its Opening Brief, the trial court overruled the Walters’ positions as to those documents, and they have long-since been disclosed to Cowles. Thus only Document Nos. 3-75 to the *In Camera* Submission are at issue here.

¹⁰ Mr. Manix did draft a comprehensive liability and damages evaluation “report” to Hartford, dated July 25, 2001, concerning the status of his firm’s investigative findings as of that date concerning the matter. A copy of that “report,” which was circulated only to Hartford, to the District’s excess liability insurer, and to Dr. Anderson, is Document No. 71 to the *In Camera* submission. It too can leave no doubt as to the claim-defense purposes of Mr. Manix’s, Mr. Clay’s, and, at their direction, Mr. Prescott’s, investigation.

Since the WSCH firm's purpose in investigating the incident was to defend against claims based on it, and as the threat of claims had been obviated by the settlement, that firm's investigation of the incident was terminated upon the settlement in mid-August, 2001. CP 402-03, 450-52, 553. Additionally when settlement of the case occurred, Mr. Prescott – who had terminated his work on the case in mid-June per Mr. Manix's instruction when the mediation was scheduled – forwarded to Mr. Manix his investigation billing. Mr. Manix in turn submitted the billing to Hartford, per the authorization that had been originally given by Mr. Dill in the week following Nathan's death. Hartford did pay that billing, directly to Mr. Prescott's firm. CP 403-04, 538.

Mr. Manix and Mr. Clay each further testified below, without contradiction, that based on their experience in representing some 80 public school districts in this state, and in particular in defending school districts against anticipated and actual tort claims, disclosure of the documents requested by Cowles here would cause substantial and irreparable harm to their school district clients' ability to effectively defend themselves in the future against anticipated and actual liability claims and lawsuits. They testified that in order for them to effectively defend those clients and their employees (and volunteer parents) in such matters, they must take notes when they discuss the matters with their clients and witnesses; they must

have investigators that they retain take notes when the investigators discuss the matters with clients and witnesses at their direction; they must at times ask their clients to prepare notes concerning the matters; and they must prepare liability and settlement evaluation reports for their clients and their liability insurers. Further, they testified below, they need their clients to feel free to communicate with them in the utmost candor. CP 406, 559.

Mr. Manix and Mr. Clay further testified below that if they and their clients had to fear that that such materials would be subject to disclosure under a request made by any citizen pursuant to the Public Records Act (much less by the media or by an adverse claimant or litigant), they would be forced to either refrain from preparing such materials, or they would attempt to cause such materials to be crafted in such a limited way that their value would be minimal, if not of no value whatsoever, in defense efforts. Mr. Manix and Mr. Clay further testified below that such a situation would result in an extremely unfair situation of disadvantage for their school district clients not only because persons with claims against school districts would not be able to access the school district's (and the district's employee's) attorney-client communications and work product, but those same claimants, and their own counsel, would have the ability to generate any of their own attorney-client privileged and work-product-doctrine-protected materials without fear that they would ever be subject to

counterpart disclosure under the Public Records Act. They testified that this would result in an unbalanced playing field in the claims and litigation setting and would cause substantial and irreparable harm not only for school districts, but for all government entities in this state, as they are all subject to the Public Records Act. CP 406-07, 559-60.

Neither Ms. Patterson, nor Mr. Smith, nor Ms. Dullanty, nor Ms. Reed-McKay, nor Ms. Heimstra, nor Ms. Bordwell, nor the School District (whether through Dr. Livingston or Dr. Anderson or anyone else), has ever consented to a waiver of the attorney-client privilege relative to the communications they had with Mr. Manix or Mr. Clay, or Mr. Prescott's on our behalf, concerning the incident involving Nathan. Nor do they ever intend to do so. CP 407-08; 455; 514; 521; 528; 531; 534; 545; 549; 560-61.

In discovery in this litigation, Cowles refused to disclose what information it already possessed concerning the facts surrounding Nathan's death. Cowles termed such information "irrelevant" and "immaterial." Cowles further refused in discovery to disclose what alternative sources it had attempted to access – whether successfully or not – toward the end of obtaining information substantially equivalent to that contained in the documents at issue. Again Cowles termed that discovery "irrelevant" and "immaterial." CP 639-59. Further along these same lines in discovery,

Cowles was provided a list of all of the persons Mr. Manix, Mr. Clay, and/or Mr Prescott had interviewed in the course of their investigation, and Cowles was asked whether it had attempted (and if so, if it had succeeded) in interviewing these persons. Again Cowles refused to provide such information, terming it “irrelevant” and “immaterial.” CP 640-59.

III. AUTHORITIES AND ARGUMENT

The trial court properly held the School District had shown cause that the Public Records Act itself, RCW 42.17 *et seq.*, put the documents at issue in this case beyond the reach of the Act because the materials were “classic” attorney-client privileged and work product documents. Further, disclosure of the records would cause substantial and irreparable damage not only to the Spokane School District, but to all other state and local governmental agencies in Washington who are subject to the Act – each of which, like the School District here, frequently find themselves in the position of having to defend themselves and their employees against anticipated and actual tort liability claims.

In order to effectively defend against such anticipated and actual liability claims, the government agencies of this state and their employees (and like here, volunteers) must have the ability to engage in the most intimate of discussions with their attorneys, and to generate work product materials, in the utmost candor without fear that those communications or

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In order to effectively defend against such anticipated and actual liability claims, the government agencies of this state and their employees (and like here, volunteers) must have the ability to engage in the most intimate of discussions with their attorneys, and to generate work product materials, in the utmost candor without fear that those communications or

documents will subject to disclosure on five days' notice to any citizen (much less to the media, or even to the adverse litigant and his counsel) who chooses, for the cost of a postage stamp, to serve a one-sentence request therefor under the Act. *See* RCW 42.17.320 (Act imposes on agencies a five-day deadline for producing documents in response to a written request received thereunder); RCW 42.17.330 ("The examination of any specific public record may be enjoined if... the superior court... finds that such examination... would substantially and irreparably damage vital governmental functions"); *O'Connor v. Dept. of Social & Health Svcs.*, 143 Wn.2d 895, 910, 25 P.3d 426 (2001) (a plaintiff pursuing suit against a government agency may obtain documents pertaining to the issues in the litigation via a request made to the defendant agency under the Public Disclosure Act, in lieu of, or in addition to, using Requests for Production under Washington Rule of Civil Procedure 34).

The documents at issue here constitute the purest form of attorney-client privileged and work product-protected materials conceivable. An instance of proper and necessary application of the Act's wise exemption from disclosure of such materials could be not be clearer than the extremely unique facts of this case present.

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A. Records Protected By the Attorney-Client Privilege or the Work Product Doctrine are Exempted from Disclosure Under the Public Records Act.

Cowles' extremist and astonishing lead argument below was, and here is, that where there is an asserted "public need" for information, materials that otherwise would be protected in litigation by the attorney-client privilege or the work product doctrine are not exempted by the Public Records Act. The directly contrary application of RCW 42.17.310(1)(j) is established by multiple authorities that preceded the oral argument of the counterpart Show Cause and Summary Judgment motions below, and, only four weeks prior to the actual written decision below, was squarely reaffirmed by the Washington Supreme Court in *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (May 13, 2004). In fact the Supreme Court in *Hangartner* further held that even if attorney-client privileged materials are not generated in relation to a "controversy" (and thus therefore fall outside RCW 42.17.310(1)(j)), they still are properly withheld by a public agency pursuant to the attorney-client privilege statute, RCW 5.60.060(2)(a), under the "other statutes" exemption of the Public Records Act at RCW 42.17.260(1). *Id.* at 453.¹¹

¹¹ RCW 42.17.260(1) provides, in pertinent part: "Each agency... shall make available for public inspection and copying all public records, unless the record falls within ... [an] other statute which exempts or prohibits disclosure of specific information or records."

Nevertheless, Cowles' extremist philosophical bent causes it to make the astonishing argument, even on appeal to this Court, that public agencies do not enjoy an attorney-client privilege in their written word nor in their work-product materials, as Cowles indeed decries the Supreme Court's nine-month-old decision in *Hangartner* as "improper." Cowles' Opening Brief at 35-37.

Despite that the public-disclosure purpose of the Public Records Act is extremely important to our democratic government as one being run "by the people for the people," the peoples' elected representatives, at RCW 42.17.310, understood that allowing completely unfettered access to a government agency's records is most certainly not in the interests of the public that those agencies serve, as it would lead to invasions of privacy and wasteful and inefficient governance. *See* RCW 42.17.010(11) (in setting forth the public access purposes of the Act, the Legislature was also "mindful of the right of individuals to privacy and of the desirability of the efficient administration of government..."). The peoples' elected representatives have therefore set forth no less than 80 categories of documents that a governmental agency need not produce in response to a request made pursuant to the Act, *see* RCW 42.17.310(1)(a) through

(1)(ggg). These are in addition to the exemptions the Legislature further created by the “other statutes” exemption at RCW 42.17.260(1).¹²

Aside from exemptions that assure the confidentiality of documents necessary to national security, perhaps the most significant and important of the many exemptions the Legislature deemed it wise to set forth is the one the trial court found controlling in this case, at RCW 42.17.310(1)(j). This is the exemption by which the Legislature assured that our government agencies would occupy a level playing field relative to parties who sue them in civil litigation. That dispositive provision provides, in pertinent part:

The following are exempt from public inspection and copying:

(j) Records which are **relevant to a controversy** to which an agency is a party but which records **would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.**

RCW 42.17.310(1) (emphasis added). By this exemption, any document created or held by a government agency that relates to (or when generated,

¹² The “other statutes” exemption at RCW 42.17.260(1) would include the principal basis upon which the Walters family filed their underlying Declaratory Judgment claims, the Family Educational Rights and Privacy Act, by which Congress prohibited public school districts that receive federal funding from releasing to third parties records maintained by them (or their representatives, such as legal counsel), that contain information directly pertaining to an identifiable student. See 20 U.S.C. §1242g((a)(4)(A)(i) and (ii). It would also include Washington’s Health Care Information Access and Disclosure Act, at Chapter RCW 70.02, *et seq.*, which the Walters also relied upon for a contention that because all of the records at issue contain health care information related to Nathan, they are exempt from production to Cowles via this “other statutes” provision of the Act. See CP 8-16, 70.

related to) a “controversy,” and that would not be (or would not have been) susceptible to discovery by a party adverse to that agency with respect to that controversy is exempt from disclosure under the Act.

Thus, the controlling inquiries in this case were below, and are now upon *de novo* review, twofold: (1) Were the documents sought here by Cowles generated in relation to a “controversy” as contemplated by RCW 42.17.310(1)(j)? and (2) Had the claims based on Nathan’s death not been settled but instead litigated, would Mr. and Mrs. Walters and their counsel, Bruce Nelson, have been entitled to production of them from the School District under Washington Superior Court Civil Rules governing discovery? The answers to those two inquiries are, plainly and respectively, in the affirmative and then in the negative.¹³

B. In this Case the Exemption of RCW 42.17.310(1)(j) is Co-Extensive With the Attorney-Client Privilege and the Work Product Doctrine.

As stated above, RCW 42.17.310(1)(j) expressly places beyond the disclosure obligations of the Public Records Act any document that was generated in relation to a “controversy” and that would not have been subject to discovery in civil litigation. This express statutory principle had been applied uniformly by our courts prior even to being recently

¹³ In fact because of this, the School District need not even rely on the *Hangartner* decision as a “fall-back” authority dictating that those of the records here falling within the attorney-client privilege are absolutely protected and need not have been produced in any event, even if they had not been generated in relation to a “controversy.”

reaffirmed in *Hangartner*. E.g., *Harris v. Pierce County*, 84 Wn. App. 222, 235, 928 P.2d 1111 (1996); *Overlake Fund v. Bellevue*, 60 Wn.App. 787, 795, 810 P.2d 507 (1991).

1. The Materials At Issue Were Indisputedly Generated in Relation to a “Controversy.”

Cowles has asserted throughout these proceedings that an actual lawsuit must have been pending between the Walters and the School District at the time the disputed documents were generated in order for the “controversy” requirement of RCW 42.17.310(1)(j) to be fulfilled.

Cowles’ extremist media bent has caused it to take a flatly incorrect legal position. Borrowing from the Rule 26(b)(4) standard for work product that has been applicable now for many decades in this state, the cases have uniformly construed the term “controversy,” specifically for purposes of RCW 42.17.310(1)(j), as encompassing “completed, existing, or reasonably anticipated litigation.” E.g., *Guillen v. Pierce County*, 144 Wn.2d 696, 713, 31 P.3d 628 (2001) (emphasis added); *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993); *see also Hangartner, supra*, 151 Wn.2d at 791. Further in this regard, Washington courts have held:

Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus, the test should be whether, in light of the **nature of the document** and the **factual situation in the particular case**, the document can **fairly be said** to have been prepared or obtained **because of the prospect of litigation**.

Heidebrink v. Moriwaki, 38 Wash. App. 388, 396, 685 P.2d 1109 (1984) (emphasis added), *quoting* 8 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 2017-21, PP. 198-99, *rev'd on other grounds*, 104 Wn.2d 392, 706 P.2d 212 (1985).

Review of the virtual mountain of uncontradicted evidence submitted below, by way of the affidavit submissions of Dr. Livingston, Dr. Anderson, Mr. Manix, and Mr. Clay, not only as to the fact and timing of the onset of their anticipation of the prospect of litigation, but of their immediate actions in response to learning of the incident, can leave no doubt whatever that the materials at issue here were prepared **precisely** because of the prospect of litigation.

Here the onset of anticipation of litigation for the School District's officials and their legal counsel occurred literally contemporaneously with their learning the preliminary reports of the facts surrounding Nathan's death. And under the *Heidebrink* standard, *supra*, 38 Wash. App. at 396, that anticipation was manifestly reasonable, based on that very first report of the apparent then-existing factual situation. That report was that Nathan, a District third-grade student, had died of a peanut allergy reaction he had suffered on a field trip that afternoon while entrusted to the care and control of his teacher, who was previously on notice of

Nathan's severe allergy; that Nathan's death had resulted from his consumption of part of a sack lunch that contained a peanut butter sandwich, a bag of trail mix laced with peanuts, and a peanut butter cookie; that the District's food preparation staff, who had also been previously put on notice that Nathan had a severe peanut allergy, had regardless provided this peanut-laced lunch to him; that on the field trip Nathan had reported to his teacher that he'd eaten part of the peanut products in the lunch and was not feeling well; that instead of calling 911, otherwise having Nathan transported for immediate medical care, or administering an Epinephrine shot that was given to the teacher to take along on the field trip specifically for this purpose, Nathan had instead placed Nathan on the bus for more than while the other students finished the field trip activities – when Nathan was finally removed from the scene, only to go into his ultimately fatal anaphylactic arrest in a private vehicle on the way down the Green Bluff hill.

Cowles cannot credibly dispute that even a first-year school administrator or attorney – or even a first-year journalist, for that matter – would **immediately** anticipate the eventuality, let alone prospect, of a wrongful death suit upon hearing report of these facts. Indeed, among other initial tort-defense advice Mr. Manix and Mr. Clay provided to District officials that very afternoon and evening – before any of the

documents at issue were generated – Mr. Manix and Mr. Clay discussed with Dr. Anderson:

- what role the District’s tort liability insurer, Hartford, would play in the context of a tort claim;
- application of the attorney-client privilege and work-product doctrine to the investigation of the incident Mr. Manix and Mr. Clay were going to initiate the next morning;
- wrongful death and survival action damages elements that would be available under Washington law in the context of a minor’s wrongful death.

Any one of these uncontradicted facts, standing alone, could only lead to the conclusion that in this very unique factual setting a liability claim was in fact anticipated within minutes of Nathan’s death – and therefore that a “controversy” existed under RCW 42.17.310(1)(j).¹⁴

One would have a hard time even hypothetically conceiving of an instance wherein actual, subjective anticipation of litigation was clearer than this case presents. And that that anticipation was not only actual, but that it was eminently reasonable under the circumstances, is equally undeniable. *Dawson, supra*, 120 Wn.2d at 791; *Heidebrink, supra*, 38

¹⁴ As noted in the Facts section, that Mr. Manix and Mr. Clay discussed such matters with Dr. Anderson the very afternoon and evening of Nathan’s death was not only established below by their and Dr. Anderson’s affidavits below, it was corroborated by the attorneys’ billing entries for the date of Nathan’s death, May 18, 2001. And the fact that notice of an actual wrongful death claim was indeed submitted by Nathan’s parents, through counsel, just three business days after Nathan’s death only served to confirm for Mr. Manix, Mr. Clay, Dr. Anderson, and Dr. Livingston, the correctness of their immediate anticipation of the prospect of litigation.

Wash. App. at 396. Even in the spirit of zealous advocacy, it cannot be honestly disputed that the “controversy” element under RCW 42.17.310(1)(j) is met here.¹⁵

C. Documents Protected From Disclosure By the Exemption of RCW 42.17.310(1)(j) Retain That Protection After the Controversy For Which They Were Generated Is Settled.

The exemption of RCW 42.17.310(1)(j) for attorney-client privileged and work product materials applies regardless of whether the controversy for which the materials were generated, in the first instance, was thereafter settled, litigated to conclusion, or otherwise terminated. In other words, the exemption under the Act from disclosure that originally attaches to a particular document because it was created as an attorney-client privileged communication and/or a work product document in the course of a given controversy survives the conclusion of that controversy. *See e.g., Limstrom v. Ladenburg*, 136 Wn.2d 595, 613, 963 P.2d 869 (1998), which was decided in the precise context of the Act’s exemption under RCW 42.17.310(1)(j):

¹⁵ In fact, the nature and content of the documents at issue here, themselves, further establish that the prospect of litigation was anticipated from the very first report of Nathan’s death, before any of those documents were even generated. The Court is urged to review the records in the *In Camera* Submission each individually and collectively, as did the trial court, in determining whether this is so. Particularly conclusive as an individual document in this regard may be Document Number 54 to the *In Camera* Submission, which was Mr. Manix’s first written defense evaluation report to Hartford. There he summarized – only eight business days subsequent to Nathan’s death – all of the defense steps that he and his partner, Mr. Clay, had taken, with the assistance of their investigator, Mr. Prescott, to defend against a wrongful death suit in the first days following Dr. Anderson’s telephonic report of the circumstances of Nathan’s death.

The application of the work product exemption does not depend on the status of the litigation as open or closed, solved or unsolved. The work product rule **continues to protect materials prepared in anticipation of litigation even after the litigation has terminated. We do not distinguish between completed and pending cases.**

(Emphasis added); *accord Dawson, supra*, 120 Wn.2d at 790; *Yakima Newspapers v. Yakima*, 77 Wn.App. 319, 324, 890 P.2d 544 (1995); *see also e.g., Pappas v. Holloway*, 114 Wn.2d 198, 210, 787 P.2d 30 (1990).

D. The Attorney-Client Privilege Attaches Where Disclosure of A Document Would Directly or Indirectly Disclose Communications Between An Attorney and His or Her Client or Between An Agent of the Attorney and the Client.

The scope of permissible discovery in a civil case excludes materials held by an adversary that are privileged. Civil Rule 26(b)(1) provides: “Parties may obtain discovery regarding any matter, **not privileged**, which is relevant to the subject matter involved in the pending action...” (emphasis added). The attorney-client privilege applies to “communications and advice between an attorney and client **and extends to documents which contain a privileged communication.**” *Pappas, supra*, 114 Wn.2d at 203 (emphasis added), *citing Kammerer v. Western Gear Corp.*, 27 Wash. App. 512, 517-18, 618 P.2d 1330 (1980), *aff’d*, 96 Wn.2d 416, 635 P.2d 708 (1981).

And although the issue has not been presented or decided by a Washington court, many authorities from other jurisdictions hold that

where a private investigator working under an attorney's retention and direction in a claims context has communication with the attorney's client, that communication is protected not just by the work product doctrine, but by the attorney-client privilege as well. *E.g.*, *United States v. McPartlin*, 595 F.2d 1321, 1335 (7th Cir. 1979); *Clark v. City of Munster*, 115 F.R.D. 609, 613 (N.D. Ind. 1987); *Pennsylvania v. Noll*, 443 Pa. Super. 602, 607, 662 A.2d 1123 (1995); *Whitham Memorial Hospital v. Gatzimos*, 706 N.E.2d 1087, 1091 Ind. 1999).¹⁶

E. The Work Product Doctrine Protects Materials Generated By a Party, The Party's Attorney, or the Party's Agents In Anticipation of Litigation.

Materials generated by a party or its attorneys or its agents in anticipation of litigation are "work product" documents, and as such enjoy a broad protection from discovery pursuant to Civil Rule 26(b). *See* CR

¹⁶ The Court need not necessarily reach a Washington-law first-impression decision on that point here, since Mr. Prescott's notes of his communications with the WSCH firm's clients here so plainly fall within the work product doctrine. Nevertheless, *see Gatzimos*, *supra*, 706 N.E. 2nd at 1091:

Just as communications made directly between an attorney and his or her client are privileged, so too are communications between attorneys and the ... investigators they hire on behalf of a client, as well as communications between agents of the client and agents the attorney hires on behalf of the client. The attorney-client privilege attaches to communications between the client and an agent of the attorney, so long as (1) the communication involves the subject matter about which the attorney was consulted, and (2) the agent was retained by the attorney in rendering legal advice or conducting litigation on behalf of his client.

Here, in a statement this Court need not comment upon in affirming the ruling below, the trial court stated that Mr. Prescott's work product should be viewed no differently than if an employee of Mr. Manix's and Mr. Clay's office had generated it. CP 87.

26(b)(4).¹⁷ Thus “under the... Washington rule[], there is **no distinction** between **attorney and non-attorney** work product,” *Heidebrink, supra*, 104 Wn.2d at 214-15 (emphasis added).

E. Each of the Documents Falls Within the Attorney-Client Privilege, the Work Product Doctrine, Or Both.

It is a very simple matter to demonstrate the trial court’s correctness in finding that each and every one of the documents here at issue is “clas-sic” attorney-client privileged material, or within the work product doctrine, or both. CP 760. Each document fits within one of the following 11 categories.

1. Mr. Manix’s or Mr. Clay’s notes of discussion they had with District client representatives or their individual clients:

Mr. Manix and Mr. Clay had an attorney-client relationship with the District through Dr. Livingston and Dr. Anderson and other District

¹⁷ Civil Rule 26(b)(4) provides:

(4) Trial Preparation: Materials. [A] party may obtain discovery of documents and tangible things **otherwise discoverable** under subsection (b)(1) of this rule and prepared **in anticipation of litigation** ... **by or for another party** or **by or for that other party's representative** (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(Emphasis added.)

management personnel. They further had an attorney-client relationship with Ms. Patterson, Mr. Smith, Ms. Dullanty, Ms. Reed-McKay, Ms. Heimstra, and Ms. Bordwell. Mr. Manix's and Mr. Clay's notes of discussions with their own clients concerning the matter fit squarely within the attorney-client privilege. Additionally, these notes were prepared in anticipation of litigation. The School District respectfully submits that even in the context of zealous advocacy, the application of both the attorney-client privilege and the work product doctrine to these notes cannot be honestly disputed by Cowles.

2. Mr. Manix's or Mr. Clay's own notes of interviews they conducted of non-client witnesses concerning the matter:

Non-client witness interviews by Mr. Manix and Mr. Clay were performed by them in their capacities as agents of the District, and the notes they took during those interviews were prepared in anticipation of, and to assist in defense of, litigation. Such notes related to a controversy and are the purest form of work product imaginable. They are within the exemption of RCW 42.17.310(1)(j).

3. Notes of the investigator hired by Mr. Clay and Mr. Manix, of interviews he conducted of Mr. Manix's and Mr. Clay's six individual clients, at Mr. Manix's and Mr. Clay's direction:

As noted, numerous other jurisdictions would hold that Mr. Prescott's notes of his interviews of Mr. Manix's and Mr. Clay's six

individual clients are protected not only by the work product doctrine, but by the attorney-client privilege as well. The Court here need not issue a Washington first-impression ruling on that point, however. Mr. Prescott prepared these notes as an agent of Mr. Manix's and Mr. Clay's, and of their clients, in anticipation of litigation. Application of the work product doctrine to these notes, and therefore the exemption from production under RCW 42.17.310(1)(j), is plain.¹⁸

4. Mr. Prescott's notes of interviews he conducted of non-client witnesses at Mr. Manix's and Mr. Clay's direction:

Mr. Prescott's notes of the interviews he conducted of non-client witnesses, at the direction and request of Mr. Clay and Mr. Manix, were prepared in anticipation of litigation. Those notes are therefore also protected from disclosure under the exemption of RCW 42.17.310(1)(j).

¹⁸ Notably, even if they did not fall within the attorney-client privilege, Mr. Prescott's notes of these client interviews and witness interviews (the next category addressed above) at least constitute the type of work product entitled to absolute protection under CP 26(b)(4). This is because disclosure of them would tend to disclose Mr. Manix's and Mr. Clay's mental impressions, conclusions, opinions, or legal theories concerning the anticipated claims. Mr. Manix and Mr. Clay freely discussed with Mr. Prescott their factual and legal defense theories, in the context of explaining to him who they wanted him to interview and in what regards each particular interviewee's story would affect their theories. As the trial court found after reviewing Mr. Prescott's notes and the other evidence, a reader of Mr. Prescott's notes would therefore have a window into Mr. Manix's and Mr. Clay's legal theories. See RP 87-89.

But nevertheless again, in any event, even if Mr. Prescott's notes only constitute "ordinary" work product, they are still properly withheld because of Cowles' failure to establish any of the three "substantial need" elements of CP 26(b)(4) necessary to pierce "ordinary" work product protections, as discussed *infra* at pp. 64-71.

5. Mr. Clay's notes of discussion with Mr. Prescott concerning the results of certain of the interviews Mr. Prescott had conducted:

Again, the School District would contend that the proper privilege characterization of Mr. Clay's notes of discussions he had with Mr. Prescott are protected under not only the work product doctrine but the attorney-client privilege as well. Under the authorities cited from other jurisdictions, *supra* at pp38-39 and n.16, the notes of such discussions should be no different than would notes Mr. Clay might have made of discussions he had with a paralegal in his firm concerning the matter. However, the issue of attorney-client privilege related to Mr. Clay's notes of his discussions with Mr. Prescott need not be reached, because the work product doctrine is so squarely applicable here to those notes. They were indisputedly prepared in anticipation of litigation, and are thus exempted from disclosure by RCW 42.17.310(1)(j).

6. Notes which Ms. Patterson and Ms. Reed-McKay prepared specifically for counsel:

That such notes prepared by clients for counsel are the purest form of attorney-client privileged materials, and therefore protected from disclosure under RCW 42.17.310(1)(j) (as well as, independently, the work product doctrine), cannot be honestly disputed.

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7. Notes prepared by a WSCH attorney, Rockie Hansen, concerning her impressions upon review of a videotaped witness statement:

That the attorney-client privilege and the work product doctrine apply to notes taken by an attorney who was Mr. Clay's and Mr. Manix's law partner at the time, communicating to them her evaluation of a witness videotape provided by the Walters' counsel, cannot honestly be disputed.

8. Mr. Manix's draft of an e-mail to a consulting expert he retained:

Mr. Manix's unsent, draft correspondence to a consulting expert witness he had retained plainly falls within the work product doctrine and therefore also within the exemption of RCW 42.17.310(1)(j).

9. Photographs and a map of the Green Bluff farm taken and drawn by Mr. Prescott at Mr. Manix's and Mr. Clay's request:

These materials prepared by Mr. Prescott at Mr. Manix's direction plainly fall within the work product doctrine, as they were prepared by a party or its agent in anticipation of litigation.

10. Mr. Manix's liability and settlement evaluation reports to the District and the District's primary and excess liability insurers:

It again cannot be honestly disputed that tort liability and damages evaluation reports by an attorney to his client and his clients' insurers are protected by both the attorney-client privilege and the work product

doctrine. The exemption under RCW 4.17.210(1)(j) therefore obviously applies to these documents.¹⁹

11. Mr. Manix's mediation statement to the mediator:

This document is obviously exempted from disclosure by RCW 42.17.260(1)'s incorporation by reference of exemptions for documents made confidential by "other statutes," via RCW 5.50.070, our state's mediation confidentiality statute.

By the foregoing categorization and the unique uncontradicted anticipation-of-litigation context and attorney-client relationship setting which prevailed in response to the underlying incident, it is easily demonstrated that the trial court was correct in finding that each document at issue was and is a "classic" attorney-client privileged document, or a document falling within the work product doctrine, or both. CP 760.

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¹⁹ Cowles may point out that it does not now seek defense counsel's liability and damages evaluation reports to Hartford and the District. It is true that after some 2½ years of litigation, Cowles withdrew its quest for these documents in the course of briefing below. It nevertheless must be noted that that decision had to have been strategically driven, because even Cowles knows that if it continued to insist that those highly sensitive documents be divulged, Cowles itself would be crystallizing the unacceptably extreme nature of the positions it continues to take on this appeal. Nevertheless, for Cowles to be consistent in its arguments here, Cowles would have to continue to assert that even those documents must be produced because "they contain facts," Cowles Opening Brief at 19-20, 27, and because it is Cowles' position that public agencies simply have no attorney-client privilege in written documents in the face of the Public Records Act, *id.* at 35-37.

G. Cowles' Contention That the Documents Lose Their Protection Against Disclosure Because "They Contain Facts" Reveals A Misunderstanding of the Nature of the Protections of the Attorney-Client Privilege and the Work Product Doctrine.

As it did in the trial court, Cowles argues now that because the documents at issue contain "facts" that were found through Mr. Manix's, Mr. Clay's, and Mr. Prescott's investigation of the circumstances of Nathan's death, the documents fall outside the attorney-client privilege or the work product doctrine and must be produced either altogether or in redacted form. In making this "But they contain facts" argument, Cowles fundamentally misapprehends the bedrock legal precept that governs privileges in documents.

The School District obviously agrees that in civil litigation, a party may not "hide" any facts relevant to the issues in a case by claiming they are protected from disclosure because they happened to have been learned in the course of a verbal or written communication between the client and his attorney, or happened to be stated in the client's, or his attorney's, or his other representative's, work product materials. The adverse litigant is absolutely entitled to full disclosure of those facts through sworn responses to interrogatories and through answers to questions asked at deposition. However, the very nature of the protection of the attorney-client privilege and the work product doctrine is that the adversary still cannot obtain any

attorney-client privileged or work-product documents that contain those facts (absent, of course, in the case of “ordinary” work product, fulfillment of the showing required to overcome the protection under CR 26(b)(4)).

This is easily illustrated by a hypothetical projection of the trajectory of the Walters’ wrongful death claims had they not been settled but instead been litigated. In that scenario attorney Bruce Nelson, on behalf of the Walters, certainly would have asked through interrogatories and deposition for a disclosure of each and every fact known to Mr. Manix and Mr. Clay, or the District or their other clients, or Mr. Prescott, based on their investigation, that was relevant in any way to the events leading up to or surrounding Nathan’s death. Disclosure would have been absolutely required as to each and every one of those facts in answers to such discovery – regardless of whether they originally became aware of all or any of them through attorney-client communications and regardless of whether they were learned through their investigation in anticipation of litigation. To take a contrary position would, indeed, be sanctionable.

However, at the same time, it is elementary that if Mr. Nelson instead or additionally sought disclosure of those same facts through a Request for Production of **documents** held by the District or the individual clients or their counsel constituting attorney-client communications or that were generated in anticipation of the litigation, he would not be entitled to

obtain those documents – no matter how loudly he cried, “But those documents contain facts.” That is the very nature of the privileges as applied to documents.

Simply, Cowles’ observation that the documents here at issue “contain facts” is only an observation, and one that has no legally probative effect in advancing Cowles’ effort to obtain the documents at issue in the face of the protections afforded them that are held by Ms. Patterson, Mr. Smith, Ms. Dullanty, Ms. Heimstra, Ms. Bordwell, Ms. Reed-McKay, and the School District under RCW 42.17.310(1)(j).

H. Cowles’ Contention That Mr. Manix’s and Mr. Clay’s Notes of Discussions They Had With Their Clients Are Not Protected Because They Were Not “Transmitted” To the Clients Is Untenable.

Cowles also asserts the equally-astounding position that the attorney-client privilege does not protect the notes that an attorney writes to his own file to memorialize the content of the most intimate, privileged verbal communication that the attorney has had with his or her client, unless the attorney then mails or otherwise transmits those notes to the client. Nor, Cowles apparently would contend as a converse proposition, does the attorney-client privilege protect notes made by a client, to his or her file, of legal advice given him or her by the attorney in that privileged conversation, unless the client mails or otherwise transmits those notes to

the attorney. *E.g.*, Cowles Opening Brief at 4, Issue No. 5 under Assignment of Error No. 1; 38-39.

Cowles' position is, respectfully, legally preposterous. Even Cowles presumably would concede the proposition that under the attorney-client privilege, Mr. Manix here, for example, could never be forced to disclose the substance of verbal conversations he had concerning personal liability exposure with one of his clients, Mary Patterson, the parent volunteer who was enlisted to assist Nathan on the field trip and found herself by that graciousness but happenstance in the midst of this awful event. However, Cowles insists – without citation to authority – that the attorney-client privilege does not attach to Mr. Manix's own notes to his file memorializing the content of that **very same, admittedly-privileged verbal communications** with Ms. Patterson. According to Cowles, its news reporters and any other requester under the Public Records Act – including the Walters' counsel, had the claims below not been settled – can access the substance of that most-intimate attorney-client conversation because once Mr. Manix wrote his notes, he placed them in his file and never “transmitted” them to Ms. Patterson. Cowles says that because those notes do not, as “mere” pieces of paper that have never left Mr. Manix's possession, constitute “communications” in and of themselves between

attorney and client, they cannot be within the privilege. *See* Cowles' Brief at 38-39.

This novel argument constitutes nothing less than an attempt to circumvent the attorney-client privilege by indirectly obtaining access to the content of privileged verbal discussions that could not be directly accessed. As such it is clearly denounced in the law, *see e.g., Heidebrink v. Moriwaki*, 104 Wn.2d 392, 404, 706 P.2d 212 (1985) ("The purpose of the attorney-client privilege 'is to encourage free and open attorney-client communications by assuring the client that his communications will neither directly **nor indirectly** be disclosed to others'," *quoting State v. Chervenell*, 99 Wn.2d 309, 316, 662 P.2d 836 (1983) (emphasis added).

Further authorities are clear in rejecting Cowles' position:

The attorney-client privilege applies to communications and advice between an attorney and client **and** extends to documents which **contain a privileged communication.**"

Heidebrink, supra, 104 Wn.2d at 404 (1985) (emphasis added); *accord Pappas v. Holloway*, 114 Wn.2d 198, 203, 787 P.2d 30 (1990) *Kammerer v. Western Gear Corp.*, 27 Wn.App. 512, 517-18, 618 P.2d 1330 (1980), *aff'd*, 96 Wn.2d 416, 635 P.2d 708 (1981); *Victor v. Fanning Starkey Co.*, 4 Wash. App. 920, 921-22, 486 P.2d 323 (1971).²⁰

²⁰ Instructive and further controlling on this bedrock point of privilege law is *Redding v. Virginia Mason Med. Center*, 75 Wn.App. 424, 878 P.2d 483 (1994), decided under identical and analogously-controlling facts. In *Redding*, the statutory psychologist-patient

Finally, last but far from least on this point, the following definitive rule adopted by the Washington Supreme Court in the Public Records Act case of *Limstrom v. Ladenburg*, *supra*, disposes of Cowles' argument that it is entitled here to Mr. Manix's and Mr. Clay's notes of what they said to their clients, and what their clients said to them, in privileged conversations: "The **notes or memoranda prepared by the attorney from oral communications** should be **absolutely protected**, unless the attorney's mental impressions are directly at issue." *Limstrom*, 136 Wn.2d at 611-612 (emphasis added).

I. The WSCH Firm's Investigation of the Incident Was Not "An Ordinary-Course, Administrative Investigation" By the District; The District Established Below That It Was An Investigation Performed Only For the Purpose of Defense Against Anticipated and Then Actual Claims.

Cowles' next argument attempts to question whether the investigation conducted by the District's lawyers here, with Mr. Prescott at

privilege was at issue. The court held that that privilege operated not only to prohibit compelling the psychologist to testify to the verbal statements that had been made to him by his patient during a counseling session, but prohibited compelling disclosure of the notes the psychologist had taken of the patient's very same statements to him at the counseling session. *Id.* at 427-29. This holding in *Redding* is dispositive in refuting Cowles' position in this case, because in Washington, cases construing the psychiatrist-patient privilege and the attorney-client privilege have interchangeable precedential effect, because the Legislature expressly made the psychiatrist-patient privilege coextensive with the attorney-client privilege. *Id.* In this regard, the psychologist-patient privilege, at RCW 18.83.110, states in pertinent part:

Confidential communications between a client and a psychologist shall be privileged against compulsory disclosure to the same extent and subject to the same conditions as confidential communications between attorney and client...").

See also Redding, *supra*, 75 Wn.App. at 429.

their direction, was conducted for the purpose of defending against anticipated litigation. Cowles' tilt at that unavoidable factual windmill is that Mr. Manix and Mr. Clay were somehow instead engaged by the District and (its liability insurer, Hartford?), to conduct an "ordinary-course, administrative investigation" of the incident, in some sort of "substitute capacity" for the benefit of the District's Safety Office, to determine whether the incident involved violations of District procedures pertaining to its food allergy protection program and to recommend improvements to that program.²¹

In an attempt to support this argument, Cowles points out that at the time of the incident, the District's Safety Office had published guidelines and forms directing certain District personnel to report accidents involving employees or students, and tasking District Safety Office personnel to investigate via filling out and filing forms, conducting interviews, etc. By extremely loose and selective citation to Dr. Anderson's deposition, Cowles would then have the Court believe that indeed, these published regulations

²¹ In fact, subsequent to Nathan's death, the District did revise its food allergy protection procedures, via the recommendations of a District Task Force that included Nathan's father, parents of other students in the District with severe food allergies, the Director of Food and Nutrition Services at Deaconess Medical Center, a physician specializing in pediatric food allergies, a nursing professor from Intercollegiate Center for Nursing Education, a biology professor from Gonzaga University, and the spouse of a Spokane County Superior Court Judge. CP 455-56, 457-510, 748-49; 755-757. At no point in the work of this Task Force were any of the documents here at issue disclosed to or reviewed by its members, nor was there any discussion of the facts surrounding Nathan's death by the Task Force. CP 748-49; 755-57.

and procedures were followed by the District in “every case” involving a student injury. Then, Cowles’ argument goes, since these “ordinary-course, administrative investigation procedures” were “uniquely” not followed by the District in its response to this particular incident involving Nathan’s death, then – *Voila!!* – the investigation by Mr. Manix’s and Mr. Clay, and Mr. Prescott at their direction, “had to” have been intended by the District to “supplant” or “substitute” for the “missing” “ordinary-course, administrative investigation.”

Dr. Anderson testified directly contrary to the premise which Cowles attempts to build upon. Dr. Anderson in fact testified that as of the time of the incident, the Director of the District’s Safety Office, Joe Madsen, was midstream in the course of working on an “evolving” program to draft and publish forms to be used, and procedures to be followed, for a Safety Office “ordinary course, administrative investigation” in response to incidents involving employee and student injuries. Dr. Anderson however testified at length that particularly as concerned student (as opposed to employee) injuries, as of the time of Nathan’s incident, there was very little support and only very sporadic compliance with Mr. Madsen’s “evolving” effort. His testimony on the subject was variously as follows:

- Mr. Madsen’s published procedures and forms “were an evolving set of documents that had very inconsistent levels of understanding and following by school principals and school staff,” CP 629, ll 10-

12 ,... “[a]nd as far as implementation..., my take on it at the time of Nathan’s death is that this wasn’t followed very much or known sometimes very much or supported. [The Safety Office had been developing the procedures] without a lot of success. CP 629, ll. 17 – 20.

- Q: So what I’m hearing you say is that even though you had a policy that said that the witness statement should be taken, which is no. 6, the School District didn’t do that?

A: Inconsistently.

Q: Did it in some cases and not in others?

A: Right. And mostly for employee accidents.

Q: Not for students?

A: Right. CP 631, ll. 4-13

- Q: This does contemplate, it would appear, that the Safety Committee should have been filling out forms with regard to students, too.

A: It does. From my knowledge, that either wasn’t happening or really wasn’t the main purpose of the Committee. CP 632, ll. 3-8.

- Q: I’m just talking general. I should have been more specific in my question. This was a form that told people what to do in the event of a field trip emergency. One of the things they were told was to document all events. Putting aside the Walters situation and looking at other incidents involving field trips, was this procedure followed in terms of getting written reports from teachers, coaches, or bus drivers as to the items listed in No. 7?

A: Probably, again, inconsistently... As our Risk Management office was evolving, trying to – So maybe, maybe not. CP 633, ll. 7- 18.

- “There was an expectation by the Safety and Risk Management Director that the [published procedures] would be followed, but I don’t think he had the full support of the school system that they be followed... And that has improved over the years. But at the time of this incident, it was still in its evolving stage.” CP 634, ll. 4-17.

Simply put, Cowles’ singular reliance on Dr. Anderson’s deposition for the fundamental premise of its argument – that Mr. Manix and Mr. Clay, and

Mr. Prescott, at their direction, were simply performing an investigation of the facts surrounding Nathan's death that **would have been** performed, as a matter of "ordinary-course administration," by and for the benefit of the District's Safety Office – could not be sustained below nor can it now.

Further, how can Cowles claim that this was somehow an "ordinary course, administrative investigation" for the District's Safety Office when – as Cowles points out *ad nauseum* in its own Brief – the materials generated by that investigation were never forwarded to the Safety Office, nor for that matter, to anyone in the District? Cowles' non-sensical suggestion is that this was a "substitute" District Safety Office investigation that was **never provided to the District's Safety Office, nor to the District.** In fact, that the materials were and still are retained in legal counsel's files, and were only shared with the District's chief legal officer as attachments to his carbon copies of tort liability and damages evaluation reports to Hartford, *see* CP 627-28, refutes Cowles' protestation that the documents were generated for any purpose other than for claims-defense counsel's efforts to resist initially-anticipated, and shortly thereafter actual, claims.

Moreover, if Mr. Manix, Mr. Clay, and Mr. Prescott were performing an "ordinary-course, administrative investigation," wouldn't the District have shared the documents or the information contained in the documents with the Food Allergy Task Force that the District formed to

propose revisions to its procedures? That that was never done is, alone, additionally dispositive.

And conversely, in attempting to sustain its protestation, Cowles cannot even venture answers to the following. If the investigation was for a purpose other than claims-defense, would Mr. Manix, Mr. Clay, and Mr. Prescott have:

- given to Dr. Anderson legal advice, within minutes of the event, as to how Washington negligence law might be applied to the conduct of District personnel and volunteers according to the preliminarily-reported facts?
- given to Dr. Anderson's legal advice, within minutes of the event, how Washington wrongful death damages law might be applied given that a death involving a minor child?
- discussed with Dr. Anderson, within minutes of the event, the role they foresaw Hartford playing with respect to such an anticipated wrongful death claim?
- discussed with Dr. Anderson, within minutes of the event, application of the attorney-client privilege and the work product doctrine to the investigation they were about to embark upon, and provided he and Dr. Livingston advice about not breaching those privileges in dealings with the media?
- within a day of the event, begun developing liability defense theories as to: (1) whether the District nurses had properly trained District personnel to respond to any allergic reaction involving Nathan; (2) whether the actions taken by the District's employees and the volunteer parent chaperone on the field trip had been prudent, in the context of the information they possessed and their observations of Nathan's condition while they were monitoring him; and (3) whether Nathan himself might have some contributory fault for taking a bite of the cookie; (4) whether Nathan's ingestion of the part of the cookie was in fact the medical and proximate cause of

Nathan's death; (5) whether there was another person, not in an employment or volunteer capacity with the District, whom might have liability for the incident; and (6) whether Nathan's parent(s) might have liability based on information or lack of information provided to the District?

- within three days of the incident, analyzed the District's insurance policy to assure it provided individual coverage to certain of the District employees and one of the volunteer chaperones on the field trip?
- within three days of the incident, instituted steps for placing the District's liability insurer on notice of the exposure represented by the event?
- within three days of the incident, begun assessment of whether and which District and individual District employees were potentially subject to wrongful death claims in their individual capacities?
- had any concern about conflict-of-interest issues relative to representing both the District and individual District employees who were potentially subject to suit in their individual capacities?
- conducted an assessment of whether the District's primary and excess insurance limits would be sufficient to satisfy any judgment based on the anticipated wrongful death claims?
- within five days of the event, conducted legal research of the elements of damages available in a wrongful death damages case involving death of a minor child?
- within five days of the event, researched potential expert witnesses on liability, and actually spoken with potential experts by then?
- within five days of the event, communicated with counsel for the Walters, and discussed informal document discovery in hopes of accelerating the claims process?
- within seven days of the incident, contacted a "large loss" specialist with the District's liability insurer, and discussed with him accelerated review and confirmation that the insurer would be

providing coverage to not only the District but to the individual employees and the parent volunteer, and confirming it would be designating them “insurance-defense” counsel for the entity and those individuals?

- discussed with that same Hartford representative, at that same time within seven days of the event, authority for the expenses already incurred, and to-be incurred, for Mr. Prescott’s investigation assistance with their investigation?
- discussed with that same Hartford representative, at that same time within seven days of the event, authority to incur expenses related to expert witnesses counsel was in the process of retaining?
- within ten days of the event, begun working on an extended initial liability and damages report for Hartford, and prepared an “incident-chronology” for inclusion with that report to Hartford, which were completed and delivered to Hartford within 12 days of the incident?
- had extended dealings with counsel for two of the employees involved, to assure a joint representation agreement was reached for purposes of assuring attorney-client privilege protected communications with them?
- discussed with each of the District employees and the one parent chaperone, prior to interviewing them, that they were covered by the District’s insurance, and were counsel’s clients, on an individual basis, in addition to the District?
- made settlement recommendations to the District and Hartford and worked with the Walters’ counsel to schedule a mediation?
- Instructed Mr. Prescott to suspend his investigation efforts one month after the incident, because the parties had discussed settlement and had agreed to schedule a mediation?
- prepared and sent an extremely detailed liability and damages evaluation report to Hartford in advance of mediation?
- prepared and sent a mediation memorandum to the mediator?

- submitted Mr. Prescott's billing to Hartford (which Hartford paid)?
- submitted to Hartford their billing for legal services rendered and costs advanced after Hartford confirmed coverage and retention of them as "insurance defense" counsel, which Hartford paid?
- terminated their investigation when the mediation was successful, even the investigation was incomplete?
- discussed with Mr. Prescott, their investigator, their legal theories concerning liability exposure, as those theories pertained to each witness he was to interview at their direction?
- further, would Mr. Prescott have understood his sole purpose for involvement in the matter was to assist in Mr. Clay's and Mr. Manix's efforts to defend against anticipated civil litigation (which in fact was his understanding)?
- further, would Mr. Prescott have verbally reported or given his interview notes only to Mr. Manix and Mr. Clay (to whom he did limit his reports and notes), rather than to someone in the District's Safety Office, or at least someone within the District?
- further, would Mr. Prescott have suspended his investigation work in mid-June because a mediation was scheduled for August, and then never resumed or completed it when the case was settled?

The answers to these questions can leave no room for a conclusion other than that Mr. Manix's, Mr. Clay's, and Mr. Prescott's investigation was performed for any purpose other than claim defense.

And additionally, as noted (and as Cowles itself conceded below), the Court's *in camera* review of the nature and substance of the documents, themselves, is perhaps be the most probative evidence of whether the investigation for which they were prepared was indeed a claim-defense

investigation, or instead an “ordinary-course, administrative” District Safety Office investigation. The School District invites the Court’s thorough review of the *in camera* documents to determine the answer to that question. If ever there were a classic “work product” investigation conducted in anticipation of the prospect of litigation, the trial court was correct in finding this was it.²²

J. Cowles’ Waiver Arguments are Abjectly Untenable.

Cowles next argues that the District somehow waived attorney-client privilege and/or work product doctrine protections as to the documents at issue. As a matter of litigation equity, Cowles should be estopped to raise a waiver argument, having refused to answer discovery specifically directed to eliciting whatever facts it might contend supported a waiver argument. CP 660-61. Cowles should not be permitted on the one hand to argue that the District waived the benefit of the attorney-client privilege or work product doctrine, and at the same time refuse to disclose to the District its purported factual bases for that argument by unilaterally deeming such facts “irrelevant” and “immaterial.” CP 660-61. This Court should not countenance such a bad-faith litigation strategy.

²² In particular, the District suggests that Mr. Manix’s liability and evaluation correspondence reports to Hartford and the District, Document Nos. 54 and 71 to the *In Camera* Submission, as well as Mr. Manix’s mediation memorandum to mediator John Riseborough, Document No. 71, can leave no doubt as to the nature and purpose of the entire work product of Mr. Manix, Mr. Clay, and Mr. Prescott, at their direction, before the Court.

However even if the court were to examine the “substance” of Cowles’ waiver arguments, it would find there is none. Principles of waiver of the attorney-client privilege and work product doctrine in Washington were most recently discussed in the Court of Appeals’ decision in *Limstrom v. Ladenburg*, 110 Wash. App. 133, 39 P.3d. 351 (2002), after the Supreme Court’s remand of that case at 136 W.2d 595. This Court will recall that the *Limstrom* case, not coincidentally, arose in the specific context here at bar – application of RCW 42.17.310(1)(j)’s exemption to the Public Disclosure Act.

There, the Court of Appeals stated that even where a party has disclosed documents that would be protected by the work-product doctrine, that does not operate as a waiver as to any other work product documents of the same character held by the party. *Limstrom, supra*, 110 Wash. App. at 145 (emphasis added), *quoting* 8 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 2024 at 367 (1994). Here, Cowles does not and cannot assert that there has ever been a disclosure of any of the documents at issue, on which to base an argument of waiver as to the other documents at issue – let alone documents “of the same character.”

Further, *Limstrom* stated the rule that waiver occurs by inadvertent or partial disclosure (which Cowles would claim occurred here) only where the disclosure upon which the waiver contention rests was done in

testimony. *Id.* at 145, quoting *Chubb Integrated Sys. Ltd. v. Nat'l Bank of Wash.*, 103 F.R.D. 52, 64 n. 3 (D.D.C. 1084). In other words, a party waives the privilege if it affirmatively puts into evidence materials that would otherwise be protected by the work product privilege, and then tries to use the doctrine as a shield to avoid disclosure of other work-product documents. Here, of course, nothing of that sort has occurred.

And regardless, none of the waiver arguments Cowles has ventured have any substantive validity. As to Cowles' reference to the District's press release and even as to the *Spokesman Review's* own hearsay report of Dr. Livingston's purported statements at the press conference, there was no disclosure of any information that had been gathered by the claim-defense investigation performed to that point in time by Mr. Manix, Mr. Clay, or Mr. Prescott their direction. All that was disclosed was 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 – let alone counsel's investigation.

Moreover, as to Cowles' argument that the District's disclosure to the mediator of certain facts operated as a waiver of the work product privilege, Cowles cites no supporting Washington authority. There is none. In fact, Washington's mediation confidentiality statute states a public policy that simply would not countenance such a result. That statute, RCW

5.60.070, provides that any communication made by a party in a mediation proceeding is privileged and confidential. Cowles does not attempt to explain, nor can it explain, how a communication that is itself made in a statutorily privileged and confidential setting – i.e., a statement to a mediator under RCW 5.60.070 – can operate as a waiver of another privilege of confidentiality. The Public Disclosure Act’s exemption for materials protected by any “other statute,” at RCW 42.17.260(1), clearly applies to incorporate the provisions of the mediation confidentiality statute.²³

Cowles confounds with its next waiver argument, that attorney William Powell’s presence at the interview of Ladd Smith, and attorney Sheryl Phillabaum’s presence at the interview of Heidi Dullanty, operates as a waiver of Mr. Manix’s and Mr. Clay’s notes of their interviews of those clients. Prior to those interviews, Mr. Manix, Mr. Clay, Mr. Powell, and Ms. Phillabaum took great pains to assure a joint representation agreement was entered between counsel, for the precise purpose of assuring the attorney-client privilege attached to those interviews. In making its

²³ Further, as this Court can recognize, such a holding would bring productive mediations in this state to a halt. If mediation is to be successful, a participating party must know that he, she, or it can be absolutely candid in sharing with the mediator information, facts, or documents that are within the party’s work product protection – even with knowledge that in attempting to achieve a settlement, the mediator may pass the same on to the adversary – without fear that the party will be held to have thereby waived the work product privilege if the mediation turns out to be unsuccessful and the case proceeds to trial.

argument, Cowles simply ignores that those uncontradicted dispositive facts are in the record of this case.

K. Cowles Has Not and Cannot Fulfill Any of the “Need” Elements Required to Overcome the Protections for “Ordinary” Work Product Under Civil Rule 26(b)(4).

Cowles additionally argues that even to the extent some or all of the non-attorney-client–privileged documents here at issue might be “presumptively” protected from disclosure via the provisions of Civil Rule 26(b)(4), and therefore under the Act’s exemption at RCW 42.17.310(1)(j), Cowles can overcome that protection by contending that the *Spokesman-Review*’s readership has a purported substantial need for Cowles to report further news stories concerning Nathan’s death.

Civil Rule 26(b)(4) of course permits access to certain work product materials in certain limited circumstances. Under the Rule, a party may seek access to “ordinary” work product materials (notably, not, under any circumstances, to materials that contain the mental impressions, theories, etc., of an attorney or a party’s other agent), only if that party can carry its burden of showing:

- (1) that “in the preparation of his **case**”;
- (2) he “has a **substantial need** of the materials”; and
- (3) “he is unable without **undue hardship** to obtain the **substantial equivalent** of the materials by other means.”

CR 26(b)(4) (emphasis added); *see also Limstrom v. Ladenburg*, 136 Wn.2d 595, 610-11, 963 P.2d 869 (1998), *quoting Hickman v. Taylor*, 329 U.S. 495, 510-512, 67 S.Ct. 385, 91 L.Ed. 451 (1947).²⁴ Cowles below failed to carry its CR 26(b)(4) burden of establishing any of these three elements, let alone all three.

1. Cowles Does Not Have a Pending “Case” to Which to Relate Any Purported Substantial Need; Purported “Spokesman Readership Interest” Is Insufficient.

Protection of work product is essential to our adversary system of justice. The Civil Rules recognize that the only circumstance that can be compelling enough to force a party to disgorge even “ordinary” work product materials is where there is a need for the disclosure to facilitate the achievement of a just result in a **litigation** context. Thus the requirement of the CR 26(b)(4) that a party seeking access to even “ordinary” work product must show he has substantial need of the materials for the preparation of a “case.”

Here, Cowles does not have a “case” to prepare – what it instead has to prepare (and sell) are newspapers. Or as Cowles instead characterizes it,

²⁴ Cowles should, again, be estopped from asserting entitlement to the work product documents at issue based on a claim of substantial need of them. Again, in response to interrogatories by the School District specifically inquiring on what factual basis Cowles might contend it had a need for the documents and no alternative route to obtain the substantial equivalent, Cowles refused to respond and termed such facts “irrelevant” and “immaterial.” CR 639-661. Cowles should not now be permitted to argue that facts exist to support the necessary elements to that exception to the work product doctrine, when Cowles itself claimed, in discovery, that such facts were irrelevant and immaterial to this case.

Cowles feels there is a need among its readership for further articles about Nathan's death of nearly four years ago. Regardless and however characterized, under the express and unambiguous language of CR 26(b)(4), in the absence of a "case," such a purported readership interest simply cannot serve as the basis for overcoming the protection afforded to even "ordinary" work product materials under RCW 42.17.310(1)(j).

2. Cowles Further Has Not and Cannot Sustain Its Burden of Proving It Has a Substantial Need for the Information, as Cowles Refuses to Disclose What Information It Already Possesses.

Second and moreover, even if a substantial need for information to write news articles to sell newspapers could somehow be sufficient to fulfill the first element of the controlling CR 26(b)(4) standards, Cowles necessarily did not and could not below sustain its burden of establishing that it does not already have the substantial equivalent of the information it claims to need.

Fundamentally as a matter of simple logic, for the Court below to have determined whether Cowles had proved it had a "substantial need" for the information in the documents at issue, the question begged to be asked: Did Cowles **already have** the information it claimed to substantially need? But below, Cowles refused to tell us what information it already has gathered concerning the circumstances of Nathan's death. In this regard,

anticipating Cowles' cake-and-eat-it-too "substantial need" stratagem, the District served Cowles with discovery requesting that Cowles disclose the information it already possessed concerning Nathan's death, by identifying and disclosing the documents it had obtained and reviewed concerning Nathan's death; the identities of persons Cowles had interviewed concerning the circumstances of Nathan's death; and the information that had been imparted to Cowles by those persons on that subject. Cowles refused to answer that discovery, telling us the very facts upon which a "substantial need showing" would necessarily have to be based are "immaterial" and "irrelevant."

Without knowing the facts Cowles already possessed about the circumstances of Nathan's death, it was logically and legally impossible for the trial court below to reach a finding that Cowles had carried its burden of proving a "substantial need" to gain access to the documents at issue. Concrete examples presented to the trial court plainly established this. For instance, Cowles might suggest that it has a "substantial need" to know what facts the School District possessed, prior to the incident, concerning the extent and severity of Nathan's peanut allergy. Cowles would presumably claim that it "cannot" know this information without being allowed to review Mr. Prescott's or Mr. Manix's or Mr. Clay's notes concerning his interview with Kathe Reed-McKay, R.N., as she was

Nathan’s school nurse as of the time of the incident. However, Rick Walters, Nathan’s father, is the person who dealt with Nurse McKay prior to the incident, to apprise her of the extent and severity of Nathan’s allergy. Now we know, from Cowles’ briefing below, that a *Spokesman-Review* reporter has indeed interviewed Mr. Walters. Cowles however abjectly refused to disclose what that *Spokesman-Review* reporter learned from Mr. Walters about what he’d told Nurse McKay concerning the extent or severity of Nathan’s allergy – or indeed whether Mr. Walters even discussed that subject with the reporter. Cowles’ refusal therefore made it a logical and legal impossibility for the trial court – and for this Court – to determine that Cowles had proved a “substantial need” to review Mr. Prescott’s notes of his interview of Nurse McKay. Simply, without disclosing whether it has learned a given fact or set of facts already, Cowles itself precluded the possibility of a supportable finding below that it had carried its burden of proving it had a “substantial need” to review work product documents to learn a given fact or set of facts.²⁵

²⁵ Other examples of the self-inflicted fatal circularity of Cowles’ position below are endless. As another for instance, Cowles may claim it has a “substantial need” to review Mr. Prescott’s notes of his interview of Ladd Smith to determine what was said in the cell phone discussions that Nathan’s teacher, Ladd Smith, had from the field trip location after Nathan had reported eating the peanut product and not feeling well, with Marcous Tyler, the person in Nathan’s household that Mr. Walters had designated as the “Emergency Contact Person” whom the District should call in the event of a medical emergency involving Nathan. The District learned below, for the first time through Cowles’ briefing on the subject motions, that a *Spokesman-Review* reporter had indeed interviewed Mr.

Below, Cowles' abject refusal to disclose what it already knows of the subject matters set forth in the disputed documents constituted a logically, equitably, and legally insurmountable obstacle to an appropriate finding below that Cowles had carried its burden of proving a "substantial need" to review the information in those documents.

3. Cowles Likewise Necessarily Failed In Its Burden of Establishing a Lack of Alternative Routes for Obtaining Substantially Equivalent Information.

Likewise, Cowles' abject refusal below to disclose what documents it had reviewed, and which persons it had attempted to interview, precluded a finding that Cowles had carried its burden of demonstrating that it could not obtain substantially equivalent information, without undue hardship, through sources alternative to the protected work product documents at issue. Again Cowles' stratagem below was to refuse to disclose what alternative source it had pursued to obtain information substantially

Tyler. Again though, Cowles' refusal to disclose what Mr. Tyler told that reporter deprived the trial court of the ability to learn what Cowles already independently knows concerning the content of those phone calls. And taking this illustration further, Larry Bacon, a Laidlaw company bus driver, was present on the bus at the time and overheard the conversations. Yet Cowles would not even disclose whether it has ever interviewed Mr. Bacon.

Illustrative examples could go on and on. The Spokesman might claim to need the interview notes of Mary Patterson to "know" what happened on the ride with Nathan down Green Bluff hill. However another parent chaperone, Joanne Park, was also in the vehicle with Ms. Patterson and Nathan at that time. We learned for the first time upon Cowles' briefing with the trial court that a *Spokesman-Review* reporter did indeed interview Ms. Park. However, Cowles refused to disclose what Ms. Park told that reporter, because, Cowles said, such facts were "irrelevant" and "immaterial."

equivalent to that which is in the documents, terming such facts “irrelevant” and “immaterial.”

Without a willingness by Cowles to disclose what routes it had or had not pursued to obtain substantially equivalent information, the trial court could not conceivably have determined that Cowles had already unsuccessfully exhausted alternative routes, or that such routes would be futile without undue hardship. Again as a for instance, Cowles may claim that it has a “substantial need” to learn information regarding “all” of the events and occurrences on the field trip up through and until Nathan arrived at Holy Family Hospital, and that it “cannot do so” without resort to Mr. Prescott’s notes of his interviews with, for instance, Mary Patterson, or Ladd Smith, or Heidi Dullanty. There were however **multiple** other persons who were witnesses to the events of the field trip who were available to Cowles as alternative sources for “substantially equivalent” information without undue hardship.²⁶

²⁶ These include the following persons, each of whom was disclosed to Cowles by the District: Norm Heinen, Richard Van Skoik, Deanna Lague, and Joanne Park, who were other parent chaperones present on the field trip for supervision of the Logan elementary students; Becky Hines, an adult who was present on the same field trip, but with a school from a different district; Larry Bacon, the bus driver employed by Laidlaw and who was present on the bus the entire time Nathan was on it with Ms. Patterson, and who witnessed Nathan’s symptomology, the cell phone calls, and what was done in the course of monitoring of Nathan; Jamie Ward, who was a student teacher along on the field trip and not a District employee; Greg Riddle, who owned the farm and was present during the field trip; any of the approximately 45 other Logan elementary students who were on the field trip, four of whom Mr. Prescott interviewed; Chief Robert Anderson, or any of the

Again, Cowles' refusal to confirm or deny whether it had even attempted to interview persons such as these, and then moreover whether Cowles succeeded in interviewing any particular one of them, and then moreover, if so, the information such persons provided to Cowles, precluded a finding below that Cowles was unable, without undue hardship, to discover through alternative sources information substantially equivalent to that which is contained in the work product-protected documents here at issue.

L. The District's Participation in Filing This Declaratory Judgment Action With the Walters Was Procedurally Proper; And In Any Event, the Show Cause Motion Cowles Joined Mooted Any Procedural Issues.

Finally, Cowles argues that the underlying Declaratory Judgment Act Petition brought by the District and the Walters here was improperly filed, as Cowles protests that a public agency that has received a records request under the Public Disclosure Act may not initiate an action requesting a judicial declaration as to whether the documents must be produced. Cowles asserts that the Act's intention is that the only proper way for resolving a dispute as to whether a document falls within an exemption to the Act is for the agency to deny the request, and then wait to

Mead Fire Department Emergency Medical Technicians who were involved in the efforts to resuscitation Nathan and transportation of him to Holy Family. And et cetera.

see if the requester brings a Show Cause action and motion for an order directing that the records be disclosed.

Cowles cites no authority for the proposition it urges, nor is there any. Not only that, but the Act itself expressly refutes it by directly authorizing the action that was brought here. As to the Walters' filing, the Act expressly provides:

[t]he examination of any specific public record may be enjoined if, upon motion and affidavit by... **a person to whom the record specifically pertains**, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would substantially and irreparably damage any person...

RCW 42.17.330 (emphasis added). As to the School District's filing, the Act expressly also provides:

[t]he examination of any specific public record may be enjoined if, upon motion and affidavit by **an agency or its representative**, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would substantially and irreparably damage vital government functions.

Id. (emphasis added.) The statute thus expressly authorized the School District's filing.

Further and regardless, Cowles itself has rendered its own argument moot. Cowles' entire (albeit legally incorrect) point is that a dispute regarding the applicability of an exemption to the Public Disclosure Act is susceptible to resolution, only, by the requester obtaining a Show Cause

Order from the Court directing the agency to appear and demonstrate why an exemption to the Act justifies its withholding of records. Cowles obtained and served such a Show Cause Order here. The District responded to it and the trial court found the District had shown cause as to why the documents fit within an exemption to the Act. CP 766. Even according to Cowles' argument, the issue was properly joined by Cowles itself and it was decided by the trial court. Thus even indulging Cowles' position as to the purportedly "proper" procedure, that procedure was followed here and the Show Cause proceedings below mooted any conclusion otherwise.²⁷

IV. CONCLUSION

If ever there were a situation where documents fall squarely within the scope of the exemption to the Public Records Act at RCW 42.17.310(1)(j), this is it. And if there ever were a case that demonstrates the wisdom of our elected representatives in establishing that exemption to the Act, this is it. For the reasons set forth above and for those that will be presented at oral argument, the School District, on its own behalf, and on behalf of Mary Patterson, Ladd Smith, Heidi Dullanty, Kathe Reed-McKay,

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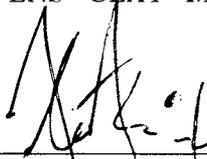
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²⁷ Cowles appears to agree with this conclusion on appeal, as Cowles concedes that at oral argument below, the parties reached agreement that the trial court should reach and decide the merits because of Cowles' own Show Cause filing. *See* Cowles Opening Brief at 17.

Lonnah Heimstra, and Linda Bordwell respectfully request that this Court
affirm the trial court's ruling in all respects.

Respectfully submitted this 21st day of March, 2005

STEVENS - CLAY - MANIX, P.S.

By: 

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**INDEX TO WALTERS SETTLEMENT AND INCIDENT INVESTIGATION RECORDS
REQUESTED BY SPOKESMAN**

<u>DOCUMENT CATEGORY</u>	<u>DOCUMENT NO. & TYPE</u>	<u>AUTHOR</u>	<u>ADDRESSEE/ INTENDED RECIPIENT</u>	<u>DATE</u>	<u>DESCRIPTION</u>	<u>WALTERS' BASIS FOR EXEMPTION</u>	<u>DISTRICT'S BASIS FOR EXEMPTION</u>
<u>I. SETTLEMENT RECORDS</u>	1. Settlement Agreement, with attached Joint Press Release	N/A (Executed by District, Teresa Walters (Nathan's mother), Rick Walters (Nathan's father); Bruce Nelson (Walters' counsel); Dr. Mark Anderson (District Asst. Superintendent) and Paul E. Clay (District's counsel)	N/A	Executed variously by parties on August 17 and 20, 2001	Agreement releasing District from claims by Nathan's Estate and Nathan's mother and father, with attached Joint Press Release	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	
<u>II. DISTRICT INCIDENT- INVESTIGATION RECORDS</u>	2. Spokane Public Schools Incident Report	Kay Savitz, District Area Director Administrative Secretary	Various District administrators and District legal counsel ¹	May 18, 2001	Initially-reported basic facts of incident	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	

¹ This column indicates the School District's general understanding of the Walters' grounds for asserting exemptions as to the identified records. The School District's counsel has advised the Walters' counsel that many of the records identified in this index contain information related to care, services, or procedures rendered to Nathan for the purpose of diagnosing, treating, or maintaining his physical or mental condition. In that regard the Walters' counsel has advised that, as a ground for asserting exemption beyond those expressly listed in this column, the Walters assert that Chapter 70.02 RCW (the Uniform Health Care Information Access and Disclosure Act) prohibits the District from disclosing any such record, pursuant to RCW 42.17.310(1)(a), and pursuant to RCW 42.17.260(1) and RCW 42.17.312. The District understands the Walters contend that that assertion applies to any document set forth in this index which contains information related to care, services, or procedures rendered to Nathan for the purpose of diagnosing, treating, or maintaining his physical or mental condition, whether before, during, or after the field trip incident.

² "District legal counsel" is Winston, Stevens, Clay & Hansen, P.S., principally per Paul Clay and John Manix relative to the incident involving Nathan. For purposes of the incident, the same legal counsel also represented the following individuals, in their respective individual capacities: Lonnan Heimstrah, R.N., Linda Bordwell, R.N., Kathe Reed-McKay, R.N., Mary Patterson, L.P.N., Ladd Smith, Heidi Dullanty. As used herein, the term "District legal counsel" is therefore intended to encompass not only counsel's representation of the District, but of those individuals as well.

<u>DOCUMENT CATEGORY</u>	<u>DOCUMENT NO. & TYPE</u>	<u>AUTHOR</u>	<u>ADDRESSEE/ INTENDED RECIPIENT</u>	<u>DATE</u>	<u>DESCRIPTION</u>	<u>WALTERS' BASIS FOR EXEMPTION</u>	<u>DISTRICT'S BASIS FOR EXEMPTION</u>
II. <u>DISTRICT INCIDENT- INVESTIGATION RECORDS</u> (cont'd)	3. Notes re incident	Mary Patterson, LPN, District volunteer chaperone who assisted in Nathan's care on field trip	District legal counsel	May 19, 2001	Handwritten notes of incident events	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	4. Interview notes	David Prescott, Professional Investigations	District legal counsel	Undated	Investigator's handwritten notes from his interview of Kathe Reed-McKay, RN, District nurse	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	5. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	Undated	District legal counsel's handwritten notes re conference with David Prescott re Prescott's interview of Kathe Reed-McKay, RN, District nurse	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	6. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 21, 2001	Investigator's handwritten notes from his interview of Ladd Smith, Nathan's Logan Elementary teacher	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	7. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 21, 2001	Investigator's handwritten notes from his interview of Richard Van Skoik, District volunteer chaperone on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	8. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 21, 2001	Investigator's handwritten notes from his interview of Deanna Lague, District volunteer chaperone on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)

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II. <u>DISTRICT INCIDENT- INVESTIGATION RECORDS</u> (cont'd)						(personal information in public school files)	
	9. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	Undated	District legal counsel's handwritten notes re conference with David Prescott re his interview of Deanna Lague, District volunteer chaperone on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	10. Interview notes	Dave Prescott, Professional Investigations	District legal counsel	May 21, 2001	Investigator's handwritten notes from his interview of JoAnne Park, District volunteer chaperone on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	11. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	May 21, 2001	District legal counsel's handwritten notes from conference with District Director of Nutrition Services, Doug Wardell	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	12. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	May 21, 2001	District legal counsel's handwritten notes from conference with David Prescott re Prescott's interview of Ladd Smith, Nathan's teacher	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files) care information)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	13. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	Undated	District legal counsel's handwritten notes re conference with David Prescott re Prescott's interview of Joanne Park, District volunteer chaperone on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)

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II. <u>DISTRICT INCIDENT- INVESTIGATION RECORDS</u> (cont'd)						in public school files)	
	14. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	Undated	District legal counsel's handwritten notes re conference with David Prescott re Prescott's interview of Richard Van Skoik, District volunteer chaperone on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	15. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 22, 2001	Investigator's handwritten notes from his interview of Heidi Dullanty, Logan Elementary teacher who was also on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	16. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	May 22, 2001	District legal counsel's handwritten notes re conference with David Prescott re Prescott's interview of Heidi Dullanty, District volunteer chaperone on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	17. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	May 22, 2001	District legal counsel's handwritten notes re conference with David Prescott re Prescott's interview of Heidi Dullanty, Logan Elementary teacher who was also on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	18. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	Undated	District legal counsel's handwritten notes re conference with David Prescott re Becky Hines being possible witness with knowledge	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)

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II. DISTRICT INCIDENT INVESTIGATION RECORDS (cont'd)	19. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 22, 2001	Investigator's handwritten notes from his interview of Becky Hines, witness who was at farm during field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	20. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 22, 2001	Investigator's handwritten notes from his interview of Mary Patterson, LPN, District chaparone who assisted with Nathan's care on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	21. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	Undated	District legal counsel's handwritten notes from conference with David Prescott re Prescott's interview of Mary Patterson, LPN, District chaparone who assisted in Nathan's care on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	22. Interview notes	David Prescott, Professional Investigations	District legal counsel	Undated	Investigator's handwritten notes re information learned in his interview of Kathy Hintz, Logan Elementary school cafeteria employee	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	23. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	Undated	District legal counsel's handwritten notes from conference with David Prescott re Prescott's interview of Kathy Hintz, Logan Elementary school cafeteria employee	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	24. Interview notes	David Prescott, Professional Investigations	District legal counsel	Undated	Investigator's handwritten notes re information learned in his interview of Sheri Charbonneau and Debbie Shultz, Logan Elementary office personnel	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)

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II. <u>DISTRICT INCIDENT- INVESTIGATION RECORDS (cont'd)</u>						(personal information in public school files)	
	25. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 23, 2001	Investigator's handwritten notes re information learned in his interview of Larry Bacon, bus driver on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	26. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	May 23, 2001	District legal counsel's handwritten notes of from conference with Doug Wordell, District Director of Nutrition Services, and re Prescott's interview of Ladd Smith, Nathan's Logan Elementary teacher	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	27. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 25, 2001	Investigator's handwritten notes re information learned in his interview of Chief Robert Anderson, Mead Fire Department	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	28. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	Undated	District legal counsel's handwritten notes from conference with David Prescott re Prescott's interview of Chief Robert Anderson, Mead Fire Department	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	29. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 25, 2001	Investigator's handwritten notes re information learned in his interview of Lorna Spear, principal of Bemiss Elementary School	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)

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II. DISTRICT INCIDENT- INVESTIGATION RECORDS (cont'd)	30. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	May 25, 2001	District legal counsel's handwritten notes from conference with David Prescott re Prescott's interview of Lorna Spear, principal of Bemiss Elementary School	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	31. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 25, 2001	Investigator's handwritten notes re information learned in his interview of Jan Rust, principal of Roosevelt Elementary School	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	32. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 25, 2001	Investigator's handwritten notes re information learned in his interview of Monica Headley, Roosevelt Elementary teacher	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	33. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 25, 2001	Investigator's handwritten notes re information learned in his interview of Anita Tschirgi, Roosevelt Elementary teacher	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	34. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	May 25, 2001	District legal counsel's handwritten notes from conference with David Prescott re miscellaneous points	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	35. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 25, 2001	Investigator's handwritten notes re information learned in his interview of Sandy Philpot, Roosevelt Elementary office secretary	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)

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II. DISTRICT INCIDENT- INVESTIGATION RECORDS (cont'd)						RCW 42.17.310(1)(a) (personal information in public school files)	
	36. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 25, 2001	Investigator's handwritten notes re information learned in his interview of Lonnah Heimstrah, RN, District nurse	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	37. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	May 25, 2001	District legal counsel's handwritten notes from conference with David Prescott re Prescott's interview of Lonnah Heimstrah, RN, District nurse	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	38. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 25, 2001	Investigator's handwritten notes re information learned in his interview of Linda Bordwell, RN, District nurse	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	39. Unfinished, unsent e-mail	John Manix, District legal counsel	District's consulting M.D. allergist expert (unsent)	Undated	Unfinished, unsent draft e-mail to District consulting expert	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	40. Preliminary chronology Memorandum	Paul Clay and John Manix, District legal counsel	District legal counsel's own file	Undated	District legal counsel's preliminary chronology of Nathan's pre-incident education and health care services and incident events	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)

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II. DISTRICT INCIDENT- INVESTIGATION RECORDS (cont'd)	41. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	May 28, 2001	District legal counsel's handwritten notes from conference with David Prescott re Prescott's interview Sandy Philpot, Roosevelt Elementary secretary	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	42. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	May 28, 2001	District legal counsel's handwritten notes re conference with Jan Rust, Roosevelt Elementary principal	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	43. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	May 28, 2001	District legal counsel's handwritten notes from conference with David Prescott re Prescott's interview of Loma Spear, Bemiss Elementary principal	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	44. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	May 28, 2001	District legal counsel's handwritten notes from conference with David Prescott re Prescott's interviews of Monica Headley, Roosevelt Elementary teacher and Anita Tshirgi, Roosevelt Elementary teacher	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	45. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 30, 2001	Investigator's handwritten notes re information learned in his interview of Norm Heinen, District volunteer chaperone along on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	46. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	May 30, 2001	District legal counsel's handwritten notes from conference with Kathie Reed-McKay, RN, District nurse	RCW 28A.605.030 (education record) 20 U.S.C. 1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)

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II. DISTRICT INCIDENT- INVESTIGATION RECORDS (cont'd)	47. Conference notes	John Manix, District legal counsel	District legal counsel's own file	May 30, 2001	District legal counsel's handwritten notes from conference with Kathie Reed-McKay, RN, District nurse	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	48. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	May 31, 2001	District legal counsel's handwritten notes from conference with Lonnah Helmstra, RN, District nurse	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	49. Conference notes	John Manix, District legal counsel	District legal counsel's own file	May 31, 2001	District legal counsel's handwritten notes from conference with Lonnah Helmstra, RN, District nurse	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	50. Conference notes	John Manix, District legal counsel	District legal counsel's own file	May 31, 2001	District legal counsel's handwritten notes from conference with Linda Bordwell, RN, District nurse	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	51. Interview notes	David Prescott, Professional Investigations	District legal counsel	May 31, 2001	Investigator's handwritten notes re information learned in his interview of Larry Bacon, bus driver on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	52. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	Undated	District legal counsel's handwritten notes from conference with David Prescott re Prescott's interview of Larry Bacon, bus driver on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 4.2.17.310(1)(a)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)

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II. <u>DISTRICT INCIDENT- INVESTIGATION RECORDS (cont'd)</u>						(personal information in public school files)	
	53. Interview notes	David Prescott, Professional investigations	District legal counsel	May 31, 2001	Investigator's handwritten notes re information learned in his interview of Jamie Ward, student teacher along on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	54. Evaluation correspondence	John Manix, District legal counsel	John Dill, Hartford Insurance Company, District's liability insurer	May 31, 2001	District legal counsel's extended initial correspondence re facts gathered to date and evaluation of liability and damages exposure	RCW 42.17.310(1)(a) (personal information in public school files) RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	55. Conference notes	John Manix, District legal counsel	District legal counsel's own file	June 1, 2001	District legal counsel's handwritten notes from conference with Mary Patterson, LPN, District volunteer chaperone who assisted with Nathan's care on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	56. Conference notes	John Manix, District legal counsel	District legal counsel's own file	June 1, 2001	District legal counsel's handwritten notes from conference with Mary Patterson, LPN, District volunteer chaperone who assisted with Nathan's care on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	57. Incident notes	Debbie Schultz, Logan Elementary school secretary	District legal counsel	Undated	Typewritten notes re Ms. Schultz' knowledge of events of date in question	RCW 42.17.310(1)(a) (personal information in public school files) RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	58. Interview notes	David Prescott, Professional investigations	District legal counsel	June 6, 2001	Investigator's handwritten notes re information learned in his interview of A.C., student along on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)

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II. <u>DISTRICT INCIDENT- INVESTIGATION RECORDS</u> (cont'd)						RCW 42.17.310(1)(a) (personal information in public school files)	
	59. Interview notes	David Prescott, Professional investigations	District legal counsel	June 7, 2001	Investigator's handwritten notes re information learned in his interview of C.P., student along on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	60. Interview notes	David Prescott, Professional investigations	District legal counsel	June 7, 2001	Investigator's handwritten notes re information learned in his interview of M.V., student along on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	61. Interview notes	David Prescott, Professional investigations	District legal counsel	June 10, 2001	Investigator's typewritten notes re information learned in his interview of Greg Riddle, owner of farm to which field trip was made	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	62. Interview notes	David Prescott, Professional investigations	District legal counsel	June 11, 2001	Investigator's handwritten notes re information learned in his interview of K.O., student along on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	63. Envelope with 14 photographs and notes	Taken by David Prescott, Professional investigations	District legal counsel	Undated	Photographs of Riddle Farm, with notes on reverse side	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)

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II. <u>DISTRICT INCIDENT- INVESTIGATION RECORDS</u> (cont'd)	64. Map	Drawn by David Prescott, Professional Investigations	District legal counsel	Undated	Hand-drawn map of Riddle Farm	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	65. Interview notes	David Prescott, Professional investigations	District legal counsel	June 12, 2001	Investigator's handwritten notes re information learned in his interview of Myrna O'Leary, representative of organization that sponsors school field trips to Riddle Farm	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	66. Notes re incident	Heidi Dullanty, Logan Elementary teacher along on field trip	Sheryl Phillabaum, Dullanty's personal counsel, and District legal counsel	Undated	Notes of incident facts	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	67. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	June 12, 2001	District legal counsel's handwritten notes from conference with Heidi Dullanty, Logan Elementary teacher along on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	68. Conference notes	John Manix, District legal counsel	District legal counsel's own file	June 12, 2001	District legal counsel's handwritten notes of conference with Heidi Dullanty, Logan Elementary teacher along on field trip	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	69. Conference notes	Paul Clay, District legal counsel	District legal counsel's own file	June 20, 2001	District legal counsel's handwritten notes from conference with Ladd Smith, Nathan's teacher	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)

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II. <u>DISTRICT INCIDENT- INVESTIGATION RECORDS</u> (cont'd)						RCW 42.17.310(1)(e) (personal information in public school files)	
	70. Conference notes	John Manix, District legal counsel	District legal counsel's own file	June 20, 2001	District legal counsel's handwritten notes from conference with Ladd Smith, Nathan's teacher	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	71. Evaluation correspondence	John Manix, District legal counsel	John Dill, representative of District's liability insurer, Hartford Insurance Company cc: Colleen Leach, representative of District liability insurer General Star Insurance Company (District liability); Mark Anderson, Ph.D., District Associate Superintendent of Management Services	July 25, 2001	District legal counsel's extended correspondence re evaluation of liability and damages exposure	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	72. Notes	Paul Clay, District legal counsel	District legal counsel's own file	undated	District legal counsel's handwritten notes re analysis of version of field trip events provided by claimed witness	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	73. Notes	Rockie Hansen, District legal counsel	District legal counsel's own file	undated	District legal counsel's handwritten notes re analysis of version of field trip events provided by claimed witness	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(e) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)

<u>DOCUMENT CATEGORY</u>	<u>DOCUMENT NO. & TYPE</u>	<u>AUTHOR</u>	<u>ADDRESSEE/ INTENDED RECIPIENT</u>	<u>DATE</u>	<u>DESCRIPTION</u>	<u>WALTERS' BASIS FOR EXEMPTION</u>	<u>DISTRICT'S BASIS FOR EXEMPTION</u>
ii. <u>DISTRICT INCIDENT- INVESTIGATION RECORDS</u> (cont'd)	74. Notes	Mary Patterson, LPN, District volunteer chaperone who assisted with Nathan's care on field trip	District legal counsel	Undated	Notes responding to version of field trip events provided by claimed witness	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine)
	75. Mediation Memorandum	John Manix, District legal counsel	Settlement mediator John Riseborough	August 13, 2001	Confidential mediation letter memorandum containing District legal counsel's rendition of facts of incident and disputed evidence and inferences to be drawn therefrom, discussion of liability and damages exposure issues	RCW 28A.605.030 (education record) 20 U.S.C. §1232g (FERPA) RCW 42.17.310(1)(a) (personal information in public school files)	RCW 42.17.310(1)(j) (attorney/client privilege and/or work product doctrine) RCW 5.60.070 (confidentiality of mediation submissions)