No. 35920-1-II

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

THE HONORABLE RICHARD B. SANDERS,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

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OPENING BRIEF OF THE HONORABLE RICHARD B. SANDERS

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I. INTRODUCTION

More than four years ago, the Honorable Richard B. Sanders ("Justice Sanders"), made a public records request to the Office of the Attorney General ("AGO"). Justice Sanders primarily sought all documents pertaining to his site visit to the McNeil Island Special Commitment Center ("SCC"). The AGO produced some records to Justice Sanders, but withheld more than 1000 pages of documents as purportedly exempt. As an exemption log the AGO provided an "Entire Document Index", which summarily stated that the records were withheld almost exclusively under the "controversy" exemption to the Public Records Act ("PRA"), but provided no detail or information as to how the exemptions applied. After Justice Sanders filed this case to compel disclosure, the AGO produced more than 200 pages of records to Justice Sanders, but continued to withhold the rest. Following cross motions for summary judgment, the trial court ordered the AGO to produce additional records, and awarded Justice Sanders a portion of his attorney's fees and penalties.

The trial court erred in several respects, however. First, the trial court incorrectly concluded that records produced by the AGO after this case was filed were somehow "exempt". Second, the AGO should have been compelled to disclose additional records that are not exempt. Third,

the trial court concluded that the AGO violated the PRA by failing to explain its claimed exemptions, but provided no remedy other than a $3 per day penalty. Finally, the trial court erred in limiting its award to partial fees and penalties, despite the fact that Justice Sanders was the prevailing party as defined under the PRA.

Justice Sanders, therefore, respectfully requests that this Court affirm the trial court's rulings requiring partial production of documents by the AGO and awarding partial attorney's fees and penalties, but reverse the trial court's refusal to order additional, non-exempt records disclosed or to award Justice Sanders full and appropriate fees and penalties.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred by ruling that documents the AGO produced subsequent to the onset of this litigation were nonetheless exempt from disclosure under the PRA.

2. The trial court erred by failing to order disclosure of non-exempt documents withheld by the AGO.

3. The trial court erred by allowing the AGO to assert new and different exemptions for the first time on cross motions for summary judgment, by allowing the AGO to contradict the testimony of its CR 30(b)(6) designee with respect to those late claimed exemptions, and by

not striking unsworn and unsubstantiated statements made by counsel with no personal knowledge of the documents attached to support those late-claimed exemptions on summary judgment.

4. The trial court erred by not awarding Justice Sanders all of his reasonable fees and costs as a prevailing party under the PRA.

5. The trial court erred by assessing only minimal penalties in this case where the AGO has consistently denied access to public records and shifted its explanations for withholding documents.

B. Issues Pertaining to Assignments of Error

1. Whether an agency may rely on the common law "common interest" doctrine to exempt documents from disclosure under the PRA, when there is no "common interest" exemption in either the PRA or any other Washington statute? (Assignment of Error No. 2).

2. Whether the controversy exemption to the PRA applies to documents that are not privileged or relevant to a "controversy"? (Assignments of Error No. 1 and No. 2).

3. Whether the attorney-client privilege protects all communications between an attorney and client, regardless of content, and even if the client had no intent to seek legal advice from the attorney during the communication? (Assignments of Error No. 1 and No. 2).

4. Whether an agency may escape liability under the PRA by producing public records after the onset of litigation? (Assignment of Error No. 1).

5. Whether an agency may withhold any explanation of its claimed exemptions until the time of dispositive motions, contradict the testimony of its CR 30(b)(6) designee when asserting late-claimed exemptions, and support those late-claimed exemptions with unsworn and inadmissible evidence, all without waiver or material penalty? (Assignments of Error No. 3, No. 4 and No. 5).

6. Whether a citizen who prevails in a PRA claim is entitled to all of his fees and costs where his fees cannot be segregated? (Assignment of Error No. 4).

7. Whether more than de minimis penalties are required where the AGO violated the PRA in multiple respects, including the withholding of nonexempt documents and the failure to provide explanations of documents it withheld? (Assignment of Error No. 5).

III. STATEMENT OF THE CASE

A. Factual Background

On June 15, 2004, Justice Sanders delivered a written request for public records (the "Request") to the AGO pursuant to the PRA.[1] CP 475, 78-79. The Request sought all records related to Justice Sanders' visit to the SCC on January 27, 2003, and subsequent action taken by the Commission on Judicial Conduct ("CJC") regarding this visit. CP 478-79.

After sending a preliminary response on June 24, 2004, the AGO responded to Justice Sanders' request on July 8, 2004 ("the 2004 Response"). CP 481-84. The response included an "Entire Document Index" ("EDI") and copies of records produced in response to a prior public records request by Tim Ford of the Building Industry Association of Washington. CP 571-606. The EDI identified 334 public records, 216 of which were produced in their entirety, and 144 of which were either withheld or redacted. CP 571-606. The EDI included a "Privilege" column, which was blank for many documents and stated that others were being withheld, in whole or in part, pursuant to the PRA's "controversy"

[1] The PRA, formerly codified in chapter 42.17 RCW, was amended and re-codified into chapter 42.56 RCW, effective July 1, 2006. The provisions in effect at the time of the Request are applicable to the current dispute. *See Zink v. City of Mesa*, 140 Wn. App. 328, 332 n.1, 166 P.3d 738, (2007). Citations in this brief are to the current PRA, with a cross-reference to the former section of the RCW.

exemption, RCW 42.56.290.[2] CP 571-606. The AGO invoked the attorney-client privilege for only one record. CP 571-606, at 604. The EDI offered no explanation of the claimed exemptions. *See* CP 571-606.

B. Procedural History

1. The AGO's Subsequent Production of Documents.

Justice Sanders filed this case in the Thurston County Superior Court on July 21, 2005, along with a motion to show cause against the AGO. CP 5-50, 97-100. After the case was filed, the AGO began to produce records that it had originally claimed were exempt. CP 487-488. On September 14, 2005, the AGO produced more than 200 pages of records and provided a new exemption log. CP 487, 608- 934. The AGO produced five more records on September 15, 2005, one record on September 27, 2005, and with this last record, produced a third exemption log. CP 488, 936-1011.[3] While the claimed exemptions changed for some records, none of the September exemption logs offered any additional explanation of how the alleged exemptions actually applied to the records in question. CP 919-32, 1001-11. In total, 33 of the 148 documents the AGO originally withheld as exempt were subsequently produced. CP 1719-20. The AGO did not assert in its briefing below that the

[2] Former RCW 42.17.310(1)(j).

[3] All of the additional documents produced in September 2005 are referred to collectively

Subsequent Production Documents were exempt under the PRA in spite of their intentional production.

Because of the AGO's failure to explain its exemptions, Justice Sanders was forced to note a CR 30(b)(6) deposition seeking the AGO's explanations. CP 499-501. The AGO provided a CR 30(b)(6) designee who could not explain the grounds for the exemptions that the AGO claimed on its exemption logs. CP 553-569. For example, the CR 30(b)(6) witness could not explain how an internal AGO e-mail referring to Justice Sanders and stating that "[i]t's like Brutus said... '[i]f you're going to appose [sic] the king, you damn will better kill him'" qualified as exempt under the PRA. CP 562. The witness could only classify this document as "an indiscreet statement." CP 562-563. In fact, she stated that all she could do was read the exemption log, which included no explanations, and state what was written on the paper. CP 564-565.

On November 4, 2005, the AGO moved for summary judgment. CP 106-126. The AGO's primary argument was that it did not violate the PRA because it disclosed to Justice Sanders the exact same documents it had disclosed to Tim Ford. CP 118-119. The AGO alleged that Justice Sanders' attorney orally modified his written request to accept only those documents received by Mr. Ford and, therefore, no further disclosure,

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as the "Subsequent Production Documents" or "SPD".

production or explanation was required. CP 118-119.

Attached with its motion, the AGO submitted a document entitled "Appendix A," which for the first time provided an explanation of how the AGO's exemptions purportedly applied. CP 127-154. In Appendix A, the AGO claimed for the first time that some documents were exempt under the "common interest" doctrine; it also added numerous claims of attorney-client privilege. CP 127-154.

Justice Sanders responded to the AGO's motion, and filed a cross-motion. CP 391-415. In his cross-motion, Justice Sanders disputed the AGO's claim that he agreed to accept only those documents disclosed to Mr. Ford. CP 400-402. Further, Justice Sanders argued that the AGO's inadequate logs and CR 30(b)(6) witness failed to provide him the information required to assess the validity of the claimed exemptions. CP 402-407. Justice Sanders also asserted that the AGO's claimed exemptions did not apply to the Subsequent Production Documents or the documents still withheld. CP 407-412.

After completion of briefing, the trial court heard oral argument. CP 1221-1222. Prior to issuing its opinion, the trial court reviewed the 115 documents the AGO claimed exemptions for and did not produce *in camera* (the "*In Camera* Documents"). CP 1724. Although the AGO never argued or asserted in its briefing that the Subsequent Production

Documents were exempt and should also be reviewed, the court raised the issue *sua sponte* at oral argument. RP (Feb. 10, 2006) 22, 51-53. When the court questioned the AGO on this issue, the AGO stated that "there's probably a decent argument that the entire thing...is privileged...." RP (Feb. 10, 2006) 22. The court then reviewed the 33 Subsequent Production Documents for claims of exemption. CP 1725.

2. The Trial Court's Opinion.

a. The court rules that the AGO violated the PRA.

On January 12, 2007, the trial court issued its opinion. CP 1361-1437.[4] The court ruled that the AGO wrongfully withheld records. CP 1724-1725. In concluding that the AGO failed to produce non-exempt records, the court rejected the AGO's primary argument that it could not have violated the PRA because it provided Justice Sanders only those documents it claims he requested. CP 118-119; *see also* CP 1063.

The court classified the overlap with Tim Ford's document request as an issue of "sufficiency of [the] search." CP 1363-1366. However, the AGO did not argue that it conducted a sufficient search; it argued that it could not have violated the PRA because "Justice Sanders got exactly what he asked for." CP 118-119; *see also* CP 1063. Nor did Justice Sanders make a primary argument that the AGO's search was insufficient,

rather Justice Sanders' claim was and is that the AGO's actual production of identified documents was inadequate. CP 397-412.

b. The AGO failed to provide a brief explanation for its exemptions as required by the PRA.

The court also ruled that the AGO violated the PRA's brief explanation requirement. CP 1718. The court observed that, under RCW 42.56.210(3),[5] when the AGO refuses to produce a specific record it must "include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." CP 1717 (quoting § .210(3)) (emphasis added). The court then concluded "that the part of § .[210(3)][6] requiring a brief explanation of how the exemption applies to the record withheld has not been satisfied. It is clear that the Entire Document Index is devoid of any explanation." CP 1718.

The court ruled that the proper remedy for violation of § .210(3) is consideration of costs, attorney's fees, and penalties. CP 1719. In so doing, the court implicitly rejected the AGO's claim that the sole remedy available for violation of the brief explanation requirement is seeking a court order compelling the agency to provide such an explanation. CP

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[4] The court's amended opinion was issued July 27, 2007. CP 1712-1725.

[5] Former RCW 42.17.310(4).

[6] As noted in the Court's Opinion on Motion for Partial Reconsideration, the Court

1443, 1631. The court also ruled that the AGO can supplement its exemption log at any time, even for the purposes of a summary judgment motion as was done here, to provide a brief explanation. CP 1718-19.

c. The AGO wrongfully withheld records.

Next, the court examined the AGO's claims of exemptions for the *In Camera* Documents in its Appendix A, as well as claims of exemption for the Subsequent Production Documents based on its *sua sponte* inquiry at oral argument. CP 1724-25, 1375-1434.

The court determined that a document was exempt from disclosure under § .290 if it was relevant to one of three controversies and if it was entitled to protection under the work product doctrine. CP 1721-22. The three controversies the court considered relevant were: (1) *In re Detention of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003); (2) *In re Detention of Spink*, 112 Wn. App 287, 48 P.3d 381 (2002), a petition for review from a Court of Appeals decision filed on June 21, 2002; and (3) *Sanders v. State,* Thurston County No. 04-2-00699-3.[7] CP 1721-22.

The court ruled that the AGO failed to produce non-exempt

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inadvertently referred to §.310(1)(j) rather than § .310(4). CP 1632.

[7] The third controversy was a suit brought by Justice Sanders against the AGO to provide him a defense in the CJC proceedings. Justice Sanders requested the AGO provide the defense on November 23, 2003 and filed his lawsuit against the AGO asserting the same on April 12, 2004. CP 109. That matter resulted in a published Court of Appeals decision, *Sanders v. State*, 139 Wn. App. 200, 159 P.3d 479 (2007), of which the

records. CP 1724-1725. The court found that the AGO wrongly withheld three of the Subsequent Production Documents, denying the claims for exemption of Documents #32 and #57, and partially denying the claim of exemption for Document #3. CP 1725. The court also ruled that the AGO wrongly withheld "seven" of the *In Camera* Documents, stating that "[t]he claims for exemption of Documents #30, #32, and #94 are denied. The claims for exemption of Documents #72 and #115 are partially denied. The claims for exemption of Documents #103 and #104 are denied, but they are duplicates of #94 and #30 respectively." CP 1724-1725. The court considered Subsequent Production Document #32 and *In Camera* Document #72 as the same document for purposes of penalties. CP 1725.

Despite the AGO's failure to argue or raise this issue in its briefing, the court nonetheless ruled that the majority of the Subsequent Production Documents were exempt. CP 1375-1434. For example, the court ruled that Subsequent Production Document #20, which stated: "It's like Brutus said, 'If you're going to appose [sic] the king, you damn well better kill him!'", was work product. CP 1013, 1436.[8] The court also ruled that Subsequent Production Document #17, dated prior to Justice

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Supreme Court granted review on May 16, 2008.

[8] Subsequent Production Document #21 is a similarly themed email: "Good job on this one...let's hang on and see where it takes us. As Scott tells me, quoting Brutus, if you are going to attack the king, you better kill him...." CP 934 (ellipses in original). The trial

Sanders' visit to the SCC, was work product. CP 681-684, 1436.

The court upheld claims of attorney-client privilege asserted by the AGO except for *In Camera* Documents #94 and #103, which it ruled were duplicates of the same document. CP 1375-1434. In doing so, the court opined that the privilege is "expansive" and applies to communications between attorneys and their clients for "purposes other than legal advice or representation." CP 1375.

Finally, the court concluded that the "common interest" doctrine, a common law doctrine, applies under the PRA. CP 1724. The court ruled that the common interest doctrine applied to *In Camera* Documents # 9, 10, 53, 55–63, 67, 83, and 84 in conjunction with its finding of an exemption for each of those documents under § .290. CP 1381, 1403, 1404-1408, 1410, 1418. The court denied an exemption for *In Camera* Document #32, although common interest was asserted, after finding a lack of an underlying exemption in the PRA. CP 1024, 1393-1394.

After the court's ruling, Justice Sanders asked the AGO if it would provide him with access to non-exempt records. CP 1650-1651, 1659. The AGO refused. CP 1650-1651.

On January 22, 2007, the AGO moved for Partial Reconsideration, questioning the court's rulings with regard to some of its wrongly

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court also ruled this document was work product.

withheld records. CP 1438-1445. Other than "slightly" modifying which specific portions of documents were wrongly withheld, the court only reversed itself with regard to one document; it now found that *In Camera* Document #115 was exempt. CP 1630-1632. The court denied the AGO's request to reconsider its ruling that fees and penalties may result from a failure to provide an adequate exemption log. CP 1631-1632.

On August 13, 2007, more than three years after Justice Sanders' original request, the AGO finally produced the wrongfully withheld *In Camera* documents. CP 1782.

3. The Trial Court's Order on Penalties, Fees and Costs.

Justice Sanders then moved for fees and penalties. CP 1633-1649. Justice Sanders requested the court award a penalty of $70 per day for each record wrongfully denied based on the fact that the AGO intentionally withheld documents, shifted its claims for exemptions, produced numerous exemption logs, contradicted its own 30(b)(6) witness, and did not provide any means to assess the validity of claimed exemptions until dispositive motions were filed. CP 1644-47. Justice Sanders also requested an award of all of his fees and costs. CP 1640.

Justice Sanders requested that, due to the contingent nature of the case, a lodestar multiplier of 50% be added on to the base amount. CP 1641.[9]

Neither the AGO nor the trial court contested or questioned the amount of fees expended or the reasonableness of the rates. *See* CP 1846. The court ruled that Justice Sanders "prevail[ed] under the statute and therefore shall be awarded costs and fees." CP 1857. Despite ruling that the AGO wrongfully withheld records and violated the PRA's brief description requirement, the court stated that the "measure of success tips overwhelmingly in favor of the [AGO]." CP 1846, 1856. To reach this conclusion, the court ruled that the AGO "prevailed" on other "aspects" of the case. CP 1846.

The court artificially segregated Justice Sanders' PRA claim into four "issues" and gave each a different "weight." CP 1858-1860. The first issue was the remedy for noncompliance with the brief explanation requirement, which was given a 10% weight. CP 1859. No weight was given to the AGO's actual violation of the brief explanation requirement. *See* CP 1859. The second issue was the so-called sufficiency of the search, given a 20% weight. CP 1859-1860. The third issue was the effect of the subsequent voluntary production of records, given a 20%

[9] This cite is to pages 8 and 9 of Justice Sanders' motion for fees and penalties. CP 1633-1649. Page 9 appears to be missing from the Clerk's Papers. Justice Sanders' motion in

weight although its relevance to whether or not a PRA violation occurred was not established. CP 1859-1860. The fourth and final issue was the core of a party's claim under the PRA: the wrongful withholding of documents – given only a 50% weight. CP 1860.

The court ruled that Justice Sanders only prevailed on the final issue and then only on a portion of the documents. CP 1860. The court ignored the AGO's actual violations of the brief explanation requirement and its wrongful withholding of some of the Subsequent Production Documents in its fees analysis. *See* CP 1858-1860. Even though the court found that Justice Sanders was forced to litigate all of the documents because the AGO did not explain its exemptions, it only awarded Justice Sanders 75% of the fees allocated to the issue he prevailed on, which in turn was given a weight of 50%. CP 1860-1861. In total, the court ruled that Justice Sanders was entitled to 37.5% of his fees. CP 1845.[10]

With respect to penalties, the court ruled that of the wrongfully withheld documents, there were two "records" for the purposes of assigning penalties. CP 1847, 1862. The first consisted of *In Camera* Documents #30 and #104 because they concerned Justice Sanders' PRA request. CP 1862. The second "record" included all of the other

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its entirety as it was filed with the trial court is attached as Appendix I to this brief.

improperly withheld documents, including the non-exempt Subsequent Production Documents, because they concerned the judicial conduct complaint against Justice Sanders and the later investigation. CP 1862. The court found that, despite the AGO's request, it lacked discretion to reduce the number of penalty days that records were wrongfully withheld. CP 1862. There were 1,132 penalty days, consisting of the number of the days between when the first disclosure and withholding of records was made and the time of production. CP 1865. The court imposed a penalty rate for wrongly withholding the documents at the statutory minimum of five dollars. CP 1867. The court determined that the proper remedy for the AGO's failure to provide a brief explanation of its claimed exemptions should be an additional penalty. CP 1867-1868. The court set the penalty for this violation at three dollars per day. CP 1868.

Following entry of judgment, this appeal proceeded.

IV. ARGUMENT

The PRA "'is a strongly worded mandate for broad disclosure of public records.'" *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 730, 174 P.3d 60 (2007) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 24 (1978)). The disclosure provisions of the PRA are "liberally

[10] The court found that Justice Sanders' fees were reasonable, but that Justice Sanders was not entitled to have his fees increased by a lodestar multiplier despite the contingent nature of the case. CP 1845-1846.

construed and its exemptions narrowly construed...." RCW 42.56.030.[11] Exemptions are only recognized under the PRA if they are specifically created by *statute*. RCW 42.56.070(1).[12]

The trial court's ruling is contrary in many respects to these fundamental principles of open government, principles that the Attorney General himself actively espouses.[13] First, although the AGO never argued that the Subsequent Production Documents were exempt, the trial court sought to manufacture "exemptions" to shield the AGO from liability. Second, the court erred in its analysis of the *In Camera* Documents by incorporating the common law "common interest" doctrine into the PRA, and by applying overbroad interpretations of attorney-client privilege and work product. Third, the trial court acknowledged that the AGO violated the PRA by failing to explain its claimed exemptions, but imposed nothing more than a slap on the wrist. Finally, the court erred in not awarding Justice Sanders all of his attorney's fees and strong penalties

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[11] Former RCW 42.17.251.

[12] Former RCW 42.17.260(1).

[13] "Attorney General Rob McKenna believes access to open government is vitally important in a free society...citizens have faced increasing obstacles and frustration in their efforts to gain access to government and information. Strong "sunshine laws" are crucial to assuring government accountability and transparency." Washington State Office of the Attorney General, Open Government, http://www.atg.wa.gov/OpenGovernment/default.aspx (last visited June 30, 2008).

where he prevailed under the PRA and the AGO's actions demonstrate a conscious disregard for the principles of the PRA.

This court reviews the trial court's rulings *de novo*. *Soter*, 162 Wn.2d at 731; *Progressive Animal Welfare Soc'y v. Univ. of Washington* ("*PAWS II*"), 125 Wn.2d 243, 252-53, 884 P.2d 592 (1994). This includes review of factual issues where, as here, the "record consists only of affidavits, memoranda of law, and other documentary evidence." *PAWS II*, 125 Wn.2d at 252. The trial court's determination of fees, costs and penalties is reviewed for abuse of discretion. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 430-31, 98 P.3d 463 (2005).

Justice Sanders respectfully requests this Court reverse the trial court's erroneous rulings, conduct its own review of the withheld records to order disclosure of nonexempt records, and order an award of all fees, plus penalties more appropriate to this case.

A. The Subsequent Production Documents were not exempt.

The trial court first erred when it ruled that 30 of the 33 Subsequent Production Documents qualified for protection under the PRA's controversy exemption. The AGO may not escape liability under the PRA simply by producing records after the onset of litigation. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 103-04 & n.10, 117 P.3d 1117 (2005); *West v. Thurston County*, __ Wn. App. __,

183 P.3d 346, 350 (2008). If records are not produced in a timely manner, this amounts to a violation of the Act and requires penalties. *West,* 183 P.3d at 350. Under this authority, "[g]overnment agencies may not resist disclosure of public records until a suit is filed and then, by disclosing them voluntarily, avoid paying fees and penalties." *Id.* Here, the AGO subsequently produced 33 documents after Justice Sanders filed this lawsuit and more than a year after his request.

The AGO did not argue in its briefing below that the trial court should review the Subsequent Production Documents for exemption. In the AGO's cover letter to Justice Sanders accompanying the Subsequent Production Documents, the AGO did not identify any claim of privilege for the documents actually produced. *See* CP 608-09.[14] Instead, it argued that it was not required to produce these documents because it withheld them from Mr. Ford, or attempted to downplay the documents as "innocuous." CP 1763-1764. At oral argument, the court prompted the AGO by asking whether or not it was asserting or abandoning a claim of privilege for the Subsequent Production Documents. RP (Feb. 10, 2006) 22. Even when prompted, the AGO did not identify or argue grounds for exemption. Counsel merely stated that "there's probably a decent

[14] The AGO's motion for summary judgment only identified exemptions for the 115 *In Camera* Documents in its Appendix A. CP 127-154.

argument that the entire thing...is privileged...." RP (Feb. 10, 2006) 22. Given that the agency bears the burden of proof to claim exemptions, RCW 42.56.904, this amounts to waiver several times over.

And waiver aside, the Subsequent Production Documents were not exempt. The court determined that many of the Subsequent Production Documents were exempt under the "controversy" exemption to the PRA. This exception to the PRA's broad mandate for disclosure, found in RCW 42.56.290, only exempts records "that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in superior courts." § .290. This requires: (1) a relevant controversy, and (2) a valid claim of privilege for the document as attorney work product. *See Soter,* 162 Wn.2d at 732-34; *Limstrom v. Ladenburg*, 136 Wn.2d 595, 605, 963 P.2d 869 (1998). A relevant controversy must be "'completed, existing, or reasonably anticipated litigation.'" *Hangartner v. City of Seattle*, 151 Wn.2d 439, 449-50, 90 P.3d 26 (2004) (quoting *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993)).

The work product rule is codified in CR 26(b)(4). *Soter*, 162 Wn.2d at 733. In the PRA context, the court has interpreted CR 26(b)(4) to protect the mental impressions of an attorney, the notes or memoranda prepared by an attorney from oral communications, and the factual written

statements by the attorney unless the party seeking disclosure of the documents has substantial need of the materials and is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.[15] *Id.* at 73-41.

The Subsequent Production Documents do not meet the requirements of the "controversy" exemption. For example, SPD #20 consists of mostly redacted e-mails. CP 1013. In the produced portion, an AGO attorney writes "Hear hear....this is really mind boggling" in response to a fellow AGO attorney's statement that "It's like Brutus said, 'If you're going to appose [sic] the king, you damn well better kill him!'" CP 1013. The trial court ruled that this specific e-mail exchange "meets the test of § .[290])." CP 1436. The court explained that the statement "pertains to litigation and it is an expression of opinion by a lawyer about a course of action concerning that litigation." CP 1436.

The Brutus reference by its nature invokes political maneuvering rather than work product. The AGO's CR 30(b)(6) witness could not explain why the email is work product, but conceded it was "indiscreet." CP 563. While the comment may be potentially embarrassing for the AGO, the "policy of [the PRA is] that free and open examination of public records is in the public interest, even though such examination may cause

[15] In the PRA context the requester need not demonstrate a substantial need. CP 1723.

inconvenience or embarrassment to public officials or others." RCW 42.56.550(3).[16]

The trial court stated that the "Brutus" e-mail is part of *In Camera* Document #31, which it ruled exempt under § .290. Assuming, *arguendo*, that *In Camera* Document #31 is partly exempt, the AGO still has a duty to produce non-exempt portions of the document. CP 1436. Indeed, in a recent amendment to the PRA, the Legislature clarified that "no reasonable construction of [the PRA] has ever allowed [public records] to be withheld in their entirety...specific descriptions of work performed [should] be redacted only if they would reveal an attorney's mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt...with the burden upon the public entity to justify each redaction and narrowly construe any exception to full disclosure." RCW 42.56.904.[17] The AGO need look no further than its own model rules on the PRA for guidance: "If a portion of a record is exempt from disclosure,

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[16] Former RCW 42.17.340(3). Even though a document might be "embarrassing," that does not qualify it as work product. *See, e.g., Amway Corp. v. Procter & Gamble Co.*, No. 1: 98-CV-726, 2001 WL 1818698, * 8 (W.D. Mich. Apr. 3, 2001) (holding that discussion of public relations problems of suits involving priests was not work product). The exact controversy to which this Brutus e-mail is relevant is also unclear, and the trial court did not link it or any of the Subsequent Production Documents to any of the three controversies it identified. *See* CP 1435-37.

[17] While this section of the PRA is specifically related to attorney invoices and was enacted after the request and withholding of documents in this dispute, courts will look to statutory amendments retroactively if the legislature acted to clarify its intent. *West v.*

but the remainder is not, an agency generally is required to redact (black out) the exempt portion and then provide the remainder." WAC 44-14-04004(4)(b)(i).

The court similarly erred in ruling that SPD #21 was exempt. CP 1436. This document is a further variation on the "Brutus" theme and states: "Good job on this one...let's hang on and see where it takes us. As Scott tells me, quoting Brutus, if you are going to attack the king, you better kill him....." CP 934. The trial court ruled that SPD #21 was exempt on § .290 grounds. CP 1436. This document is not exempt for the same reasons that SPD #20 is not exempt.

SPD #17 is another example of an erroneous exemption. SPD #17 consists of e-mails sharing some of the logistics for Justice Sanders' visit to the SCC. CP 681-684. Justice Sanders visited the SCC on January 27, 2004. The e-mails are dated January 23 and 24, 2004 – prior to Justice Sanders' visit and months before any litigation was commenced relevant to the visit.

The trial court did not identify the basis of its ruling on this document other than a blanket reference to the "controversy" exemption. CP 1436. The trial court's error with respect to this document may be explained, however, by the trial court's apparent belief that work product

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Thurston County, __ Wn. App. __, 183 P.3d at 351.

should be evaluated in hindsight rather than at the time the record was prepared. CP 1722 n. 9 (stating that the proper time to assess whether not a document is work product is "at the time of the [PRA] request...."). The work product rule offers only qualified protection for those documents "prepared in anticipation of litigation or for trial." *Soter*, 162 Wn.2d at 739 (emphasis added). The date of the PRA request should be inconsequential in this analysis.

Further, the court erroneously stated that such a distinction would be irrelevant in this case because at least one of the three relevant controversies it identified was in existence at the time each of the documents was created. CP 1722. Even if this were so, the court did not require that the document be relevant to a specific controversy. A document is exempt under the controversy exemption only if it is "relevant" to the controversy at the time it was created. *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn. App. 319, 324-25, 890 P.2d 544 (1995). A document is relevant if it is probative; namely it must have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* (affirming the trial court's adoption of ER 401 in the PRA context) (quotations omitted). Documents are not

exempt merely because some "controversy" existed when they were created.[18]

The Subsequent Production Documents were produced during litigation. The trial court erred in analyzing the documents for exemption after production where no exemptions were claimed. Further, the court misapplied the "controversy" exemption to documents that were not work product. This Court should hold that the AGO violated the PRA with respect to the Subsequent Production Documents.

B. The Trial Court Erroneously Exempted Withheld Documents.

The trial court also erroneously allowed the AGO to continue withholding documents that are not exempt. It improperly imported the common interest doctrine, a common-law privilege, into the PRA. It also applied overbroad interpretations of the attorney-client privilege and work product. Simply on the face of the AGO's listed exemptions, additional documents should be disclosed. And because of these evident errors of

[18] For example, the court ruled that 18 Subsequent Production Documents it categorized as "E-mail cover sheets transmitting documents" or "E-mails regarding scheduling and logistics", without any further elaboration, are exempt under the "controversy exemption". CP 1435-1436. Such logistical documents are not relevant to a controversy as they are not probative of the anticipated litigation and do not reveal an attorney's legal impressions, opinions or strategy.

law, this Court should review all of the *In Camera* Documents and order non-exempt documents released.[19]

1. The common interest doctrine does not apply under the PRA.

There are only two ways an exemption to the PRA can be recognized: (1) if there is an exemption codified in the PRA itself, or (2) if an exemption is contained in an "other statute." RCW 42.56.070(1).[20] The Legislature makes it clear in the PRA's legislative history that "agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide public records." Laws of 1987, ch. 403, § 1, pp. 1546-47 (emphasis added). The Washington Supreme Court recognizes that "[t]he Legislature's response [to a judicially created exemption] makes clear that it does not want judges...to be wielding broad and malleable exemptions." *Progressive Animal Welfare Soc'y v. Univ. of Washington*, 125 Wn.2d 243, 259-60, 884 P.2d 592 (1994).

Against this backdrop, the trial court erred by ruling that the judicially created "common interest" doctrine applies under the PRA. Neither the PRA nor any other statute grants an exemption for "common

[19] Given the constraints of this brief, Justice Sanders will not address the claims of exemption to each specified document, but incorporates its objections below to Appendix A, which is attached as Appendix II to this brief with the trial court's opinion.

interest" documents. Nor is any statute cited by either the AGO or the trial court in support of this proposition. CP 125-126.

Washington courts have described the common interest doctrine as standing for the proposition that "communications exchanged between multiple parties engaged in a common defense remain privileged under the attorney-client privilege." *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 716, 985 P.2d 262 (1999) (describing but refusing to apply the common interest doctrine). The trial court upheld exemptions to the PRA for 15 documents by using the common interest doctrine to extend the work product doctrine to documents created by non-parties. CP 1381, 1403, 1404-1408, 1410, 1418. The trial court concluded, without analysis, "that the common interest doctrine is recognized in Washington and is properly applied to many of the communications...." CP 1724.

The common interest doctrine is not a part of the "controversy" exemption. Any documents not produced in response to a PRA request must fit "squarely" within a statutory exemption. *Soter*, 162 Wn.2d at 731. Section .290 "'relies on the rules of pretrial discovery to define the parameters of the work product rule for purposes of applying the exemption.'" *Id.* (emphasis added) (quoting *Limstrom*, 136 Wn.2d at

[20] Former RCW 42.17.260(1).

605). Specifically, the controversy exemption relies on the codification of the work product doctrine in Civil Rule 26(b)(4). *Id.* at 733-34. While the courts have turned to the common law to help interpret the exact meaning of CR 26(b)(4)'s text, *see generally id.* at 740-45, they have correctly never expanded the PRA exemption to apply to documents created outside the scope of the rule. The text of CR 26(b)(4) provides that "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." CR 26(b)(4) (emphasis added).

Expanding the "controversy exemption" through the common interest doctrine requires the court to either create an exemption to the PRA, or broadly construe existing exemptions. Both actions violate the PRA's plain language, and would create an undefined privilege among multiple government agencies. For example, the AGO asserted common interest for documents that are e-mail exchanges between the AGO and various county and state offices. *See e.g.,* CP 1392 (*In Camera* Document No. 31 which contains e-mails between the AGO, the governor's office and county prosecutors). The trial court also found an exemption partially on common interest grounds for *In Camera* Document No. 9, even though it simply asserts that "the controversy exemption applies to these documents, since the County Prosecuting Attorneys Offices and the

[AGO] were acting with respect to a matter of common interest." CP 1381. The AGO apparently sought to protect the document from disclosure because the AGO commented on Snohomish County's motion to recuse Justice Sanders. CP 1381. There is nothing in the record, however, to substantiate the AGO's common interest with the County Prosecuting Attorney Offices, the nature of the alleged joint effort, how the actors carried out that endeavor, and why waiver has not occurred. The AGO cannot announce, for the first time at summary judgment, that documents should be exempt under such a generic, overbroad and unarticulated "common interest" theory.[21]

The trial court's incorporation of "common interest" into the PRA should be reversed.

2. The Attorney-Client Privilege is Limited to Legal Advice.

The trial court also improperly applied an overbroad interpretation of the attorney-client privilege, which it misconstrued as "expansive". CP 1375, 1724. Although the PRA exempts from production those documents that fall within the attorney-client privilege, the privilege is a narrow exemption to the general rule of disclosure required in both pretrial

[21] See also, e.g., *In Camera* Documents # 35, 53. These documents do not mention either *Thorell* or *Spink* by name, but the AGO asked the court to infer based on unsworn statements that the documents are exempt. *See* CP 1395, 1403.

discovery and public records requests. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452-53, 90 P.3d 26 (2004).

A basic tenant of the attorney-client privilege is that it only applies to "information generated by a request for legal advice." *Soter v. Cowles Publ'g Co.*, 131 Wn. App. 882, 903, 130 P.3d 840 (2006), *aff'd*, 162 Wn.2d 716, 174 P.3d 60 (2007) (emphasis added).[22] "The privilege...hinges upon the client's belief that she is consulting a lawyer in that capacity and her manifested intention to seek professional legal advice." 1 Kenneth S. Broun, *McCormick on Evidence* § 88 (6th ed. 2006). Thus, the privilege requires both the existence of an attorney-client relationship *and* the intent to seek legal advice. *Id.*; *accord* 5A Karl B. Tegland, *Washington Practice, Evidence Law and Practice* § 501.11 (5th ed. 2007) ("In general, the test is whether the communications were made when the client believed he or she was consulting a lawyer and manifested an intention to seek professional legal advice.").

The trial court ruled, however, that the privilege applies to *all* communications between an attorney and client, regardless of whether the client is seeking legal advice. CP 1724. Contrary to authority, the trial

[22] *See also Heidebrink v. Moriwaki*, 104 Wn.2d 392, 407, 706 P.2d 212 (1985) ("For the attorney-client privilege to apply, the client must believe that he is...seeking professional legal advice.") (Goodloe, J., dissenting and discussing the scope of the attorney-client privilege where the majority did not address the issue).

court opined that courts take an "expansive view of the privilege – the exception applies when the client hires an attorney for purposes other than legal advice or representation." CP 1375. This is directly contrary to the Legislature's view of the privilege under the PRA. The legislature could not speak more clearly on the topic: "The attorney-client privilege, however, is a narrow privilege...." *West v. Thurston County*, __Wn. App. __, 183 P.3d 346, 351 (2008) (quoting the 2007 Final Legislative Report amending the PRA). The court's ruling that "[o]nce an attorney-client relationship exists, any communication arising from the relationship is privileged...," CP 1724, is incorrect.

The court's overbroad reading of the privilege would, for example, exempt every communication made between a client and retained counsel, including topics that are generally not in the scope of the privilege such as the identity of the client and fee arrangement. *See Seventh Elect Church in Israel v. Rogers*, 102 Wn.2d 527, 531, 688 P.2d 506 (1984). Further, the court's interpretation of the privilege would essentially create an overarching exemption for AGO documents. The AGO serves generally as counsel to the State of Washington and its numerous branches of government, office and agencies. RCW 43.10.030, .040. Under the court's ruling, the AGO could wield the privilege to claim exemption for every communication between itself and any state agency, regardless of

substance of the communication.

Such a result is evidenced by the trial court's rulings on specific withheld documents. For example, the court upheld the AGO's claim of attorney-client privilege for a series of emails between the AGO and Bernard H. Friedman, the former Special Assistant to the Secretary of the Washington Department of Social and Health Services ("DSHS"). CP 1388. Yet, according to Mr. Friedman he did not solicit or receive legal advice in these communications. CP 447.[23] The trial court misconstrued Mr. Friedman's declaration as an effort to "waive his employer-agency's privilege." CP 1384-85. Mr. Friedman's testimony does not serve as a waiver; rather it demonstrates there was no intent from the client to seek legal advice. Although certain members of the AGO and DSHS may, in some circumstances have an attorney-client relationship, without the manifest intent to seek legal advice, the attorney-client privilege does not exempt their communications. 1 Kenneth S. Broun, *McCormick on Evidence* § 88 (6th ed. 2006). Further, it is the client, not the lawyer who holds the privilege and the client's understanding and impression control.

[23] Mr. Friedman testified as follows: "I did not think at the time (January 2003), and do not think now, that there were any legal issues that directly involved DSHS about which legal advice might have been necessary. I also do not believe I sought any legal advice from any Assistant Attorney General about Justice Sanders' visit to the SCC, or that any AG provided me with legal advice." CP 447. Notably, Mr. Friedman was never mentioned as a recipient of these emails on the exemption logs. *See* CP 448-473.

See Heidebrink v. Moriwaki, 38 Wn. App. 388, 394, 685 P.2d 1109 (1984), *rev'd on other grounds*, 104 Wn.2d 392, 706 P.2d 212 (1985).

Similarly, the AGO claimed privilege for notes of a conversation between Assistant Attorney General Kathy Mix and Washington State Supreme Court Chief Justice Gerry Alexander. CP 1034. Yet, Justice Alexander testified that he did not solicit or receive legal advice in the telephone call with Ms. Mix. CP 417 ("I did not solicit or receive any legal advice from Ms. Mix in this telephone discussion."). Further, the discussion was about whether the Supreme Court's budget would be implicated if Justice Sanders received a defense before the Commission from the AGO. CP 416-17. Not every phone call between the AGO and an agency comprises legal advice.[24]

In sum, this court should reverse the trial court's erroneous ruling on the scope of the attorney client privilege, and order disclosure of all non-privilege documents.

[24] The court's misreading of the privilege casts doubt on its application of the privilege where there is no intent to seek legal advice or actual legal advice given on a number of the *In Camera* Documents. *See* CP 1375, 1376, 1386, 1388 (respectively, documents No. 1, 2, 17 and 21). Further, for at least one document, the AGO claimed the attorney-client privilege as the basis for exemption and the court did not find the presence of the privilege but upheld exemption on an unclaimed ground. CP 1389 (No. 24).

3. The trial court misapplied the controversy exemption to the *In Camera* Documents.

The trial court also incorrectly applied the "controversy" exemption to the withheld documents. For instance, the trial court ruled that *In Camera* Document #35 was exempt work product. CP 1395. However, the document does not reference any one of the three controversies the court listed as relevant. Instead, the AGO asks that the court make an inference based on its attorneys' unsworn statements that the document relates to unspecified cases related to the SCC. CP 1395.[25] Further, the AGO did not provide in its explanation the dates the document was created. CP 1395. Without this information, there is no basis to assess whether a claim that the document was "created in anticipation of litigation" is valid.

The AGO and the trial court also failed to establish the controversy relevant to this dispute in a number of the *In Camera* Documents. *See*

[25] The AGO's Appendix A to its motion for summary judgment contains inadmissible evidence that should have been stricken. *See* CP 381-390, 1213-1220. Appendix A contains explanations of exemptions that constitute substantive factual and legal arguments. The statements are unsworn and unsubstantiated explanations from attorneys with no personal knowledge of the documents. They are therefore inappropriate for consideration on summary judgment. *See* CR 56(e). Further, the AGO presented a CR 30(b)(6) witness prior to Appendix A whose express purpose was to testify as to the reasoning behind the claimed exemptions. The AGO should not be allowed to contradict its own 30(b)(6) witness' testimony by creating new explanations for the purpose of summary judgment. *See Flower v. T.R.A. Indus.*, 127 Wn. App. 13, 39 n.1, 111 P.3d 1192 (2005).

e.g., CP 1398-1399 (Document No. 42 containing a draft letter to inmate Anthony Jacka); CP 1406-1410 (Documents No. 59, 60, 61, 62, 63 and 67 concerning the *Spivak* case). Further, it is entirely unclear that many of the documents for which work product was claimed were actually prepared in anticipation of the relevant litigation. *See e.g.*, CP 1413-1425 (Documents No. 73, 75, 78, 79, 80, 95, 97, 99, 100 created months before Justice Sanders requested a defense in the CJC proceedings).

The court's failure to require the AGO to bear its burden of proof under the "controversy" exemption requires *de novo* review of these and each of the *In Camera* Documents.

C. The Trial Court erred in ruling that the AGO had not waived its exemptions by the time of summary judgment.

The trial court should also have ordered disclosure of the withheld records because, by the time of summary judgment, the AGO waived its right to assert exemptions upon which the ruling was based. The AGO submitted three different exemption logs in this case (and "Appendix A" on summary judgment). CP 1287. The initial exemption log, the Entire Document Index ("EDI"), contained a column labeled "Privilege" which provided only statutory references. CP 571-606. The AGO provided no explanation for why any of the asserted privileges applied. The trial court ruled that "the part of [the PRA] requiring a brief explanation of how the

exemption applies to the record withheld has not been satisfied. It is clear that the Entire Document Index is devoid of any explanation." CP 1718. Further, the attorney-client privilege, RCW 5.60.060(2), was claimed for only one document – a range of pages titled "Various". CP 604.[26]

The burden to explain exemptions was on the AGO. RCW 42.56.210(3).[27] It was not until Justice Sanders initiated litigation that the AGO undertook any effort to do so. After the initiation of this lawsuit, the AGO hired a private law firm to review the documents. On September 14, 2005, the AGO determined a number of documents it initially claimed exempt "can be produced at this time." CP 608-609. Additionally, the AGO issued to Justice Sanders a second log (the "Second Log"). CP 914-917. The Second Log repeated the initial violations of the PRA by providing only a statutory reference with no explanation of the privilege claimed or how it applied to the document. CP 914-917. Further, the basis for exemption shifted for some documents, with the attorney-client privilege statute now asserted for five documents. CP 914-917.

Subsequent to the Second Log, the AGO produced more documents. CP 936. One day later, the AGO provided a CR 30(b)(6) witness who would not explain any of the exemptions listed on the logs

[26] For a summary of these variations, see CP 440-444.
[27] Former RCW 42.17.310(4).

even though that was purpose of the deposition. CP 1186-1188. Finally, on September 27, 2005, the AGO sent Justice Sanders an additional document and a third log. CP 995, 1001-1011.

It was not until cross-motions for summary judgment that the AGO produced "Appendix A" which, for the first time, purportedly explained why certain newly claimed exemptions applied to specific documents. CP 127-154. Appendix A was not supported by sworn, admissible evidence and should have been stricken under CR 56(e); it was also in direct and sweeping contradiction to the AGO's CR 30(b)(6) testimony. The AGO now claimed at least 20 documents as exempt under the attorney-client privilege. CP 443-444. Appendix A also raised the AGO's "common interest" claim for the first time. CP 442-443.[28]

These actions went well beyond mere technical violations of the PRA and demonstrate that the court's opinion that "[t]he AGO consistently made the same claims of exemptions..."[29] is contrary to the record. From the time of Justice Sanders' request, it took three logs, one

[28] In Appendix A, the AGO claimed five documents exempt by virtue of the Other Statute Exemption, but only invoked that exemption once in the EDI. CP 443. In the Original Exemption Log, the AGO claimed Document No. TF-00010 was exempt pursuant to the Controversy Exemption. CP 571-606. Yet, in subsequent exemption logs, the AGO invoked the Other Statutes Exemption. CP 914-932; *see also* CP 1001-1011. In still other cases, the AGO invoked only one exemption and then with the passage of time, and without explanation, invoked both exemptions. *Id.*, CP 571-606, 914-932.

[29] CP 1847.

CR 30(b)(6) witness and an Appendix for the AGO to evolve new exemptions and explanations that were required by the PRA following the original request. And while Washington courts have not conclusively determined "whether a corporation is absolutely bound to the testimony in a CR 30(b)(6) deposition as a judicial admission that ultimately decides an issue or if its is treated like any other testimony that may be contradicted through other corporate witnesses...," *Flower v. T.R.A. Indus.*, 127 Wn. App. 13, 39 n.1, 111 P.3d 1192 (2005), the AGO should have been held to its CR 30(b)(6) testimony because Appendix A was not testimony at all.

The trial court nonetheless ruled the AGO "may claim additional or different exemptions during judicial review." CP 1718. This statement of the law is overbroad and undermines the premise of the PRA. The trial court's reliance on *Progressive Animal Welfare Soc'y. v. University of Washington ("PAWS II")*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994), for the proposition that the AGO may repeatedly change or assert new exemptions without consequence is misplaced. CP 1718. In *PAWS II*, the President of the University of Washington sent a letter invoking grounds to exempt records. *Id.* The court held that the University was not bound solely by that letter, primarily because imposing waiver under such circumstances would frustrate the goal of prompt agency responses to records requests. *PAWS II*, 125 Wn.2d at 253. The holding and logic of

PAWS II do not apply here, where the AGO created significant barriers to the production of public records by shifting claims, producing numerous exemption logs and providing a CR 30(b)(6) witness with no ability to explain the claimed exemptions. Unlike in *PAWS II*, the AGO had ample time to analyze the records and retained outside counsel to do so.[30]

Reading the PRA as granting an agency *carte blanche* to change or add exemptions at any time would render meaningless those sections that require the timely explanation of exemptions. *See* §§ .210(3), .520. Further, the PRA provides that an agency may satisfy its duty to respond promptly to a request by telling the requester additional time is needed to "determine whether any of the information requested is exempt...." 42.56.520.[31] *See also* WAC 44-14-04003(2), (3), (7) (agency should communicate with requester and seek clarification or additional time as necessary).

At some point, the AGO's actions in this case required corresponding judicial reactions – either through greater penalties or the

[30] The trial court also cited *Citizens for Fair Share v. Dep't of Corrections*, 117 Wn. App. 411, 72 P.3d 206 (2003). CP 1719. In *Citizens*, the Court of Appeals reversed summary judgment for the AGO because it found the PRA had been violated. *Id.* at 430-31. The case does not stand for the proposition that the AGO can later provide an explanation at any time. In fact, the court in that case explicitly did not address whether or not the AGO's subsequent provision of exemptions and brief explanations was adequate because the simple act of not providing them in the first place was a PRA violation that demanded penalties and fees. *Id.*

finding of waiver.[32] Otherwise, a perverse incentive is created for a state agency to conceal its exemptions until the time of dispositive motions. The trial court's ruling was erroneous and waiver is appropriate given the multiple opportunities the AGO had to provide an explanation.

D. The Trial Court Erred In Its Calculation of Fees, Costs and Penalties.

The trial court ruled that Justice Sanders was a prevailing party under the PRA. CP 1718, 1724-25. As a prevailing party, Justice Sanders was entitled to "all costs, including reasonable attorney fees...." RCW 42.56.550(4)[33] (emphasis added); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 103 n. 10, 117 P.3d 1117 (2005) (party need not be "substantially prevailing party" to recover mandatory fees and penalties under the PRA).

1. The Trial Court Should Have Awarded All Reasonable Fees and Expenses.

The trial court erroneously ruled that it had discretion to segregate fees between successful and unsuccessful "claims." CP 1846-47. But there was only one "claim" in this case – the AGO's alleged violations of

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[31] Former RCW 42.17.320.

[32] Discovery provides an analogous situation in that a party must explain the reasons it withholds or redacts documents in response to a request for production. *See* CR 34(b); Fed. R. Civ. P. 26(b)(5)(A). Failure to do so constitutes waiver of privilege in certain factual circumstances. *See Burlington N. & Santa Fe Ry. Co. v. United States Dist. Court for the District of Montana*, 408 F.3d 1142, 1147-49 (9th Cir. 2005).

the PRA. CP 7-8. The court ruled that the AGO violated the PRA in two ways: (1) the AGO did not produce all the records it was required to; and (2) the AGO did not explain its claimed exemptions. CP 1718, 1724-1725. The AGO never contested the fees incurred or rates applied in prosecuting that claim. CP 1846. Nonetheless, the trial court substantially discounted Justice Sanders' fee award, awarding less than 40% of the total fees and expenses incurred. CP 1845.

Although an award may be tied to the portion of costs and fees involved in successfully compelling disclosure of information, *Zink v. City of Mesa*, 140 Wn. App. 328, 348, 166 P.3d 738, 747-48 (2007), here there was no basis to segregate Justice Sanders fees. All of Justice Sanders' attorney's fees and costs were necessary to prevail because he relied on the same core of facts and legal arguments. *See, e.g., Mayer v. Sto Indus., Inc.,* 156 Wn.2d 677, 693, 132 P.3d 115 (2006) (ruling that when 'claims [are] so related that no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of attorney fees.') (quoting *Hume v. Am. Disposal Co.,* 124 Wn.2d 656, 673, 880 P.2d 988 (1994)).[34] The AGO made no effort to segregate Justice Sanders' fees

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[33] Former RCW 42.17.340(4).

[34] Further, the court erred by not applying the lodestar method commonly used in contingent fee cases. CP 1845, 1858. Justice Sanders is a prevailing party under the PRA. CP 1846. His attorneys worked on a contingent fee and a lodestar multiplier of

between exempt and non-exempt documents, nor did it offer any explanation as to how this could have been done in light of its own failure to explain exemptions.

There is no support for the trial court's theory that there were four "issues" relevant to Justice Sanders' status as a prevailing party. The trial court asserted that the AGO prevailed on the question of whether it made an "adequate search" for records. CP 1856. But this "issue" was collateral at best. *See* CP 402, 1225. The trial court also characterized the Subsequent Production Documents as a separate issue, and opined that the AGO also prevailed on that issue, even though the trial court ruled at least some of those records were exempt and improperly withheld. CP 1725.

The trial court then apparently determined that each of these "issues" amounted to 20% of the case and, therefore, exonerated the AGO from paying any fees with respect to this 40%. It assigned only 10% to the AGO's inadequate exemption logs, despite the centrality of that issue to the litigation and its direct correlation to the amount of fees expended. CP 1859. Even more inexplicably, the court ruled that the AGO prevailed on the issue of the brief explanation requirement even though it characterized the AGO's violation as "obvious." CP 1855. The court then

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50% is appropriate. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598-99, 675 P.2d 193 (1983); *see also* CP 1640-1641.

took the central issue of the PRA, improper withholding of public records, assigned it only a 50% weight, and claimed that Justice Sanders prevailed on only "5% of this issue." CP 1860. As a result of this last finding, the trial court awarded Justice Sanders 37.5% of his fees and costs. CP 1845, 1861. The record shows this number is a fiction. There is no suggestion that Justice Sanders could have obtained the records he did by expending 37.5% of the fees necessary to prevail. Given the well established policies behind the PRA, a full fee award was appropriate and necessary.

2. The Court Erred in its Calculation of Penalties

a. The court abused its discretion in determining the amount of per day penalty.

The PRA mandates that the AGO pay penalties when it wrongfully withholds public records. § .550(4); *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 756, 174 P.3d 60 (2007). The "penalty provision...is intended to 'discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute.'" *Yousoufian v. Office of Ron Sims* ("*Yousoufian I*"), 152 Wn.2d 421, 429-30, 98 P.3d 463 (2005) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 140, 580 P.2d 246 (1978)).

While the court has discretion to award penalties within the statutory range, it may not award less than five-dollars or more than one

hundred dollars for each day that records are wrongfully withheld. *Id.* at 433. Moreover, an award of the statutory minimum is "reserved for instances of less egregious agency conduct, such as those instances in which the agency has acted in good faith but, through an understandable misinterpretation of the PRA or failure to locate records, has failed to respond adequately." *Yousoufian v. Office of Ron Sims* ("*Yousoufian II*"), 137 Wn. App. 69, 80, 151 P.3d 243 (2007) (quoting *Yousoufian v. Office of Ron Sims,* 114 Wn. App. 836, 853-54, 60 P.3d 667 (2003)), *review granted*, 162 Wn.2d 1011, 175 P.3d 1095 (2008). Agency actions that constitute ordinary negligence, gross negligence, wanton behavior, or that are made willfully and in bad faith demand higher penalties. *Id.*

The trial court erred by awarding the statutory minimum of five-dollars per day for the AGO's wrongful withholding of all documents in this case. The AGO does not claim that it innocently misinterpreted the PRA or that it failed to locate records. To the contrary, the AGO shifted its claims of exemption multiple times, and did not explain why the withheld records were exempt. Even after the AGO retained private counsel to review the records, documents were still wrongfully withheld. The AGO ultimately repudiated its own CR 30(b)(6) designee to justify alleged exemptions on summary judgment that were never claimed, much

less explained. These actions require an award of more than the statutory minimum.

The court further erred by awarding less than the statutory minimum in penalties for the AGO's violation of the brief description requirement. The court ruled that the proper remedy for the AGO's disregard for this section of the PRA was "consideration of costs, attorney's fees, and penalties pursuant to [§ .550(4)]." CP 1719. The AGO's violation of the brief explanation requirement is separate from the AGO's wrongful withholding of documents and a separate penalty assessment is proper. *See Citizens for Fair Share v. Department of Corrections*, 117 Wn. App. 411, 431, 72 P.3d 206 (2003) (reversing summary judgment when the trial court failed to award penalties for violation of the brief explanation requirement). The court awarded no attorney's fees and a penalty of only three-dollars per day for this violation. CP 1867-1868. The court has no discretion, however, to go below the five-dollar minimum penalty. *Yousoufian I*, 152 Wn.2d at 425. The court's decision to award only a three-dollar day penalty for the AGO's "obvious", CP 1855, violation of the PRA rendered the remedy for this violation illusory.

b. Penalties applied to all of the Subsequent Production Documents.

The trial court should also have awarded penalties for all of the Subsequent Production Documents. The AGO initially withheld 148 public documents from Justice Sanders, and produced 33 of these after this case was filed. But the court awarded penalties for only three of those documents. As argued above, however, these documents were not exempt, nor did the AGO consider them exempt.

"Government agencies may not resist disclosure of public records until a suit is filed and then, by disclosing them voluntarily, avoid paying fees and penalties." *West v. Thurston County*, __ Wn. App. __, 183 P.3d 346, 350 (2008) (citing *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005)). Indeed, "[p]enalties for late disclosure are mandatory." *Id.* Because the "the records at issue do not fall within an exemption to the [PRA], [Justice Sanders] is entitled to costs and penalties because the [AGO] did not disclose them until he filed this action." *Id.*

The trial court acknowledged that "[t]he goal of the [PRA is] liberal disclosure of public records...." CP 1720. It then erroneously asserted that "the goal of the PRA is stifled if any voluntary production after initial claim of exemption results in penalties to the agency." CP

1720. *Spokane Research* rejected this premise. Its holding prevents an agency from shifting the burden to a requester to initiate litigation before receiving records. "The requester should recover his costs, and the agency should be penalized, if the requester has to resort to litigation (the reason for the later disclosure is irrelevant). This rule promotes the [PRA]'s broad mandate of openness." *Spokane Research & Def. Fund*, 155 Wn.2d at 103 n.10.

c. The court erred by holding that there are only two groups of documents.

Finally, even assuming that this Court affirms the trial court's rulings on exemptions, the trial court's award of penalties was inadequate. Here, the court found that nine total documents were wrongfully withheld. Yet, the court only awarded penalties for six documents because it counted three documents as "duplicates," even though they were not.

The court ruled that *In Camera* Documents #30 and #104 were duplicates of the same memorandum, but #104 includes an e-mail, and the two memoranda are different versions as illustrated by signed initials that appear on one copy but not the other. CP 1392, 1427. The court also ruled that *In Camera* Document #72 and Subsequent Production Document #32 are duplicates when they plainly are not – one is a court case, the other is handwritten notes regarding the code of judicial conduct.

CP 1393, 1412. Finally, the court grouped *In Camera* Documents #94 and #103 together. While both of these documents are versions of the same memorandum, they are from different dates and one has significant editing marks. CP 1421, 1426. The court should have awarded penalties for each of these nine documents as none are exact duplicates of another.

The trial court also placed the AGO's wrongfully withheld records into two groups: (1) documents related to Justice Sanders' PRA request, and (2) documents related to the judicial conduct complaint against Justice Sanders and the subsequent investigation. CP 1637. Although courts have grouped records on the basis of time of production and subject matter, *Yousoufian I*, 152 Wn.2d at 427, 436, there must be some logic to the grouping methodology. There are at least four groups of documents here based on time of production: the three separate subsequent productions and the production of documents ordered by the Court. Following the above guidance of *Yousoufian*, penalties should be award based on each of these groups.

E. Attorney's Fees on Appeal

The fees provision of the PRA includes fees on appeal. *PAWS II*, 125 Wn.2d at 271 (citing RCW 42.56.550(4)[35]). Justice Sanders respectfully requests reasonable fees and expenses under RAP 18.1.

V. CONCLUSION

The AGO violated the Public Records Act by wrongfully withholding records and failing to explain its claimed exemptions. The trial court erred in its analysis of both the Subsequent Production Documents and *In Camera* Documents. This court should reverse in part, order the AGO produce all non-exempt records and award Justice Sanders all of his fees and costs. A strong penalty in this case will deter further AGO actions that undermine the PRA's broad mandate of disclosure.

DATED this 30th day of June, 2008.

Respectfully submitted,

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The Honorable Richard B. Sanders

[35] Former RCW 42.17.340(4)

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

Honorable Richard B. Sanders, Petitioner, v. State of Washington, Respondent.	No. 35920-1-II CERTIFICATE OF SERVICE

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STATE OF WASHINGTON
BY
DEPUTY

I hereby certify under penalty of perjury of the laws of the State of Washington that on the 30th day of June, 2008, I caused true and correct copies of the Opening Brief of The Honorable Richard B. Sanders to be delivered via U.S. Mail to the following:

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Dawn M. Taylor

APPENDICES

I.	Plaintiff's Motion for Penalties, Attorney's Fees, and Costs
II.	Court's Opinion
III.	Amended Court Opinion
IV.	Court's Opinion on Motion for Partial Reconsideration
V.	Order on Plaintiff's Motion for Penalties, Attorney's Fees, and Costs
VI.	Internet Pages
VII.	Selected Statutes and Regulations

APPENDIX I

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SUPERIOR COURT
THURSTON COUNTY, WASH.

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[X] **EXPEDITE** (if filing within 5 court days of hearing)

[X] Hearing is set:
Date: August 17, 2007
Time: 9:00
Judge/Calendar: Judge McPhee

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

HONORABLE RICHARD B. SANDERS, an individual,

Plaintiff,

v.

THE STATE OF WASHINGTON,

Defendant.

No. 05-2-01439-1

PLAINTIFF'S MOTION FOR PENALTIES, ATTORNEY'S FEES, AND COSTS

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I. INTRODUCTION

Justice Sanders brought this action against the State of Washington (the "State") for its failure to comply with the Public Disclosure Act (the "PDA"). The Court ruled that the State violated the PDA. As mandated by the PDA, Justice Sanders is therefore entitled to his attorney's fees and costs, as well as daily penalties. Given the State's intentional conduct in this case, the Court should award Justice Sanders a substantial per diem penalty for each violation of the PDA.

II. STATEMENT OF FACTS

On June 17, 2004, Justice Sanders delivered a written request for public records, (the "Request") to the Attorney General's Office (the "AGO"). Court's Opinion of January 12, 2007 ("Court's Opinion"), at 2. On July 8, 2004, the AGO sent a written response to Justice Sanders ("the 2004 Response"). *Id.*, at 4. The State did not produce all of the documents responsive to Justice Sanders' request. The Entire Document Index, accompanying the 2004 Response, included a column labeled "Privilege," indicating that approximately 141 records were being withheld. *Id.*, at 6-7. The Index did not offer any explanation of how the exemptions claimed by the State applied to the records in question.

Given the inadequacies of the Entire Document Index, and Justice Sanders' belief that the State had failed to produce non-exempt documents, Justice Sanders filed this action on July 21, 2005. As a result, the State re-reviewed its records and produced additional records over the course of September 2005 that it had originally claimed were exempt from production. The State also produced two additional privilege logs.[1]

[1] All of the additional documents produced in September 2005 are referred to collectively as the "Subsequent Production Documents".

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Declaration of Paul Lawrence, November 28, 2005 ("Lawrence Decl. (2005)"), ¶¶ 6-14, Exs. D-I. While the claimed exemptions changed for some records, none of the subsequent logs offered any additional explanation of how the exemptions applied to the records in question. *Id.*

On November 4, 2005, the State filed a motion seeking summary judgment. Attached with its motion, the State submitted its "Appendix A," which, for the first time, provided Justice Sanders with an explanation of how each claimed exemption applied to the records at issue. Justice Sanders responded to the State's motion on November 28, 2005. Then, at the Court's request, Justice Sanders filed further briefing responding to the State's Appendix A. Declaration of Paul Lawrence in Support of Motion for Penalties, Attorney's Fees, and Costs ("Lawrence Fees Decl."), ¶ 3, Ex. B. On, January 12, 2007, the Court ruled that the State violated the PDA.

First, the Court observed that, under RCW 42.17.310(4), when the State refuses to produce a specific record it must "include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." Court's Opinion at 6 (emphasis added). The Court then concluded "that the part of § .310[(4)][2] requiring a brief explanation of how the exemption applies to the record withheld has not been satisfied. It is clear that the Entire Document Index is devoid of any explanation." *Id.*, at 7. The Court ruled that, "the remedy for the AGO's violation of §.310(4) is consideration of costs, attorneys fees, and penalties pursuant to RCW 42.17.340(4)." *Id.* at 8.

[2] As noted in the Court's Opinion on Motion for Partial Reconsideration, July 27, 2007, ("Court's Reconsideration Opinion") at 3, the Court inadvertently referred to §.310(1)(j) rather than § .310(4).

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Second, the Court ruled that the State failed to produce non-exempt records. The Court held that the State wrongly withheld three of the Subsequent Production Documents, stating that, "[t]he claims for exemption of Documents #3 (partial denial), #32, and #57 are denied." *Id.*, at 14.[3] The Court also ruled that the State wrongly withheld "seven" of the "*In Camera* Documents," records that the State has still refused to produce, stating "[t]he claims for exemption of Documents #30, #32, and #94 are denied. The claims for exemption of Documents #72 and #115 are partially denied. The claims for exemption of Documents #103 and #104 are denied, but they are duplicates of #94 and #30 respectively." *Id.* at 13-14. After the Court's ruling, Justice Sanders asked the State if it would provide him with access to non-exempt records on May 4, 2007. Lawrence Fees Decl., ¶ 2, Ex. A. The State refused. *Id.*

Finally, on January 22, 2007, the State filed its Motion for Partial Reconsideration, questioning the Court's rulings with regard to some of its wrongly withheld records. Other than "slightly" modifying which specific portions of documents were wrongly withheld, the Court only reversed itself with regard to one document; it found that *In Camera* Document #115 was exempt. *See* Court's Reconsideration Opinion.

V. AUTHORITY

1. Justice Sanders is Entitled to Fees, Costs, and Penalties Because he Prevailed

When an individual prevails in establishing that the State violated the PDA, fees, costs, and penalties are mandatory under RCW 42.17.340(4). *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 433, 98 P.3d 463 (2004) (hereinafter "*Yousoufian* I") (ruling that "a

[3] Justice Sanders' motion here follows the Court's ruling. Justice Sanders reserves his right to appeal on any issues raised by the Court's ruling.

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trial court must award penalties when the PDA is violated" (emphasis added)); *see also, Violante v. King County Fire Dist. No. 20,* 114 Wn. App. 565, 571, 59 P.3d 109 (2002).[4] Fees and penalties are mandated by § .340(4) to "enforce the strong public policies underlying the public disclosure act." *Amren v. City of Kalama,* 131 Wn.2d 25, 36, 929 P.2d 389 (1997). Here, Justice Sanders prevailed in establishing that the State violated the PDA in two distinct respects, and is thus entitled his fees, costs, and penalties

i. The State's Failure to Produce Non-Exempt Public Records

Justice Sanders first established that the State failed to produce non-exempt public records. The Washington Supreme Court has repeatedly ruled that a party "prevails" under the PDA when the State fails to produce "records [that] should have been [produced] on request." *Spokane Research & Defense Fund v. Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005);[5] *see also Amren,* 131 Wn.2d at 37, *citing Yacobellis v. City of Bellingham,* 64 Wn. App. 295, 302, 825 P.2d 324 (1992) (ruling that "an award is warranted whenever an agency has erroneously denied access to the public a copy of a public record"). Here, the State originally refused to produce non-exempt Subsequent Production Documents #3, #32, and #57 and has still not produced *In Camera* Documents #30, #32, #72, #94, #103, and #104. Lawrence Fees Decl., ¶ 2.

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[4] RCW 42.17.340(4) reads, in full, as follows:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

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Even thought the Court held a number of the State's record were properly exempt, Justice Sanders is still the "prevailing party": "[a] party who wins disclosure of some, but not all, information sought, is nonetheless deemed the 'prevailing party' for purposes of awarding attorney fees and costs under the [PDA]." *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 951 P.2d 357 (1998), *as amended at* 972 P.2d 932 (1999).[6]

Additionally, and as the Court previously ruled, Justice Sanders is the prevailing party even though the State produced some non-exempt documents before ordered to do so. Court's Opinion at 9 ("I conclude that if the claim of exemption was wrongful, the agency should be penalized under 340(4) up to the date of voluntary production ... ."); *see also Spokane Research*, 155 Wn.2d at 103-4 (holding that "[s]ubsequent events do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at that time."). Indeed, "the agency should be penalized, if the requester has to resort to litigation (the reason for the later disclosure is irrelevant)." *Id.* at 104, n. 10. As the State failed to produce non-exempt documents, Justice Sanders is the prevailing party under the PDA and thus entitled to mandatory fees and penalties.

ii. The State's Failure to Explain its Claimed Exemptions

Justice Sanders also "prevailed" with regard to the State's failure to provide any explanation of its claims of exemption. Despite any of the State's assertions to the contrary, "[n]owhere in the PDA is prevailing party status conditioned on causing

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[5] When citing to authorities that occasionally use different terminology, Justice Sanders has substituted the Court's nomenclature for the sake of clarity and ease of reference. Court's Opinion at 2.

[6] *See also, Progressive Animal Welfare Society v. University of Washington*, 114 Wn.2d 677, 684, 790 P.2d 604 (1990) (hereinafter "*PAWS* I") (finding that PAWS substantially prevailed in its PDA action, even though some of the information it sought was exempt); *Koenig v. Des Moines*, 158 Wn.2d 173, 188, 142

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disclosure". *Spokane Research,* 155 Wn.2d at 103. Several courts have in fact determined that a party prevailed under the PDA when it proved that a government agency violated § .310(4) specifically. *See Citizens for Fair Share v. Dep't of Corrections,* 117 Wn. App. 411, 431-32, 72 P.3d 206 (2003) (requiring an award under the PDA because of an agency's "failure to recite an explanation for its failure to provide the requested [records]."); *PAWS* I, 114 Wn.2d at 684 (ruling that PAWS prevailed, in part, because the agency did not provide any "explanation of how the exemption applies to the record withheld."). As stated by *PAWS* I, ultimately, the "prevailing party for purposes of the public disclosure act 'is the one who has an affirmative judgment rendered in his favor at the conclusion of the entire case.'" 114 Wn.2d at 682, *quoting Tacoma News, Inc. v. Tacoma-Pierce Cy. Health Dep't,* 55 Wn. App. 515, 525, 778 P.2d 1066 (1989), *review denied,* 113 Wn.2d 1037, 785 P.2d 825 (1990). Here, the Court made an "affirmative judgment" for Justice Sanders when it ruled that the State violated RCW 42.17.310(4).

Justice Sanders is entitled to mandatory fees and penalties for its violation of RCW 42.17.310(4), just as he would be for any other violation of the PDA. Simply put, as "a violation of the PDA has been established, [the] court[] [is] required to award reasonable attorney fees and statutory penalties." *Citizens for Fair Share,* 117 Wn. App. at 437 (emphasis added). *See also, Kleven v. City of Des Moines,* 111 Wn. App. 284, 296, 44 P.3d 887 (2002) (court ruled that fees and penalties would be required if an agency violated the PDA by not adopting adequate implementing regulations as required

P.3d 162 (2006) (ruling that an award of penalties was mandatory under the PDA, even though the plaintiff only "partially" prevailed because some of the requested records were legitimately exempt).

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by RCW 42.17.290). Here, Justice Sanders successfully enforced his right to receive an adequate response to his public records request through his reliance on RCW 43.17.310(4) and is thus entitled to fees and penalties for that violation.

2. Attorneys Fees and Costs

Justice Sanders is entitled to an award of all "fees and costs involved in successfully compelling disclosure of information." *Tacoma Public Library,* 972 P.2d at 932. As explained below that includes Justice Sanders' complete fees and expenses. His fee award should also be adjusted upward under the lodestar method because his counsel undertook this matter on a contingent basis. Lawrence Fees Decl., ¶ 6.

Because the State failed to provide any explanation of its claimed exemptions, all of the attorney's fees Justice Sanders incurred in this case were necessary to establish that the State violated the PDA. The purpose of requiring a government agency to explain its exemptions is so a PDA requester may gain some insight into whether the exemptions are credible. *Limstrom v. Ladenburg,* 136 Wn.2d 595, 618, 963 P.2d 869 (1998) (ruling that § .310(4) "prevents an agency from 'silently' denying access to documents—the agency must justify its refusal"). With no such explanation in this case, it was impossible for Justice Sanders to distinguish between exempt records and records that the State wrongly failed to produce. For example, while the State mostly relied on the controversy exemption, Justice Sanders had no way of telling what "controversy" the State had in mind for each record.[7] In order to determine which records did not pertain to any existing

[7] Significantly, in its original Entire Document Index, the State invoked the controversy exemption for 138 of 141 records it first claimed as exempt, and for all but one of the records that Court ruled were wrongly withheld from production. *See* Declaration of Joell Parks filed on November 28, 2005, ¶ 8; Appendix A and B to the Court's Opinion.

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or anticipated litigation, Justice Sanders was forced to litigate all of the records withheld by the State. In short, Justice Sanders' fees cannot be segregated into those related to the exempt and non-exempt documents because he could not have narrowed his focus and still prevailed in any way. There is no need to segregate attorney's fees in such circumstances. *Steele v. Lundgren*, 96 Wn. App. 733, 783, 982 P.2d 619 (1999) (ruling that when "the plaintiff's claims involve a common core of facts and related legal theories, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised."); *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 693, 132 P.3d 115 (2006) (ruling that when "claims [are] so related that no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of attorney fees.").

In order to determine the specific amount of a fees and costs award under the PDA, the Supreme Court has adopted the "lodestar method," set forth in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983). *PAWS* I, 114 Wn.2d at 689. The first step in the lodestar method is to determine "the number of hours reasonably expended in the litigation" based on "reasonable documentation of the work performed." *Bowers*, 100 Wn.2d at 597. Next, "[t]he total number of hours reasonably expended is multiplied by the reasonable hourly rate of compensation. Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate." *Id.* Counsel for Justice Sanders have tabulated the number of hours reasonably expended on this litigation, multiplied by the standard billing rates for each

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attorney and paralegal working such hours. *See* Lawrence Fees Decl., ¶ 10, Ex. D. Accordingly, the "lodestar" for Justice Sanders' fees and in this case is $126,785.30. *Id.*

After establishing the "lodestar," the final step is to "consider the necessity of adjusting it to reflect factors not considered up to this point." *Bowers,* 100 Wn.2d at 598. Here, Justice Sanders' fee award should be adjusted up to account for "the contingent nature of success." *Id.* Justice Sanders' counsel undertook this litigation on a contingent basis. Lawrence Fees Decl., ¶ 6. As in *Bowers,* "increas[ing] the lodestar by 50 percent to reflect the contingent nature of success" is appropriate in this case. Adjusted in this way, Justice Sanders is entitled to an award of $190,177.95 in attorney's fees.

Finally, Justice Sanders must also be "awarded all costs" he has incurred in this litigation. RCW 42.17.340(4). The PDA does not define "all costs," "but the plain meaning of the word 'all' logically leads to the conclusion that the drafters of the act intended that the prevailing party could recover all of the reasonable expenses it incurred in gaining access to the requested records." *Blaine,* 95 Wn. App. at 117. Justice Sanders expended $1,170.11 in reasonable costs through this litigation, and is thus entitled to this amount in addition to his attorney's fees. Lawrence Fees Decl., ¶ 10, Ex. D.

3. Amount of Penalties

In addition to his attorney's fees, Justice Sanders is also entitled to mandatory penalties for the State's violations of the PDA. The Supreme Court explained the general method for determining penalties as follows:

> The process for determining the appropriate PDA award is best described as requiring two steps: (1) determine the amount of days the party was denied access and (2) determine the appropriate per day penalty between $5 and $100 depending on the agency's actions.

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Yousoufian I, 152 Wn.2d at 438. Correctly applying this method and the penalty scale subsequently established in *Yousoufian* II, the Court should impose a per diem penalty of approximately $70 for a period of 8781 days, as explained below. *Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 151 P.3d 243 (hereinafter "*Yousoufian* II").

i. Number of Records or Groups of Records

The first step in calculating a penalty is for a Court to decide whether to count the number of days the State failed to produce each record, or alternatively, each "group" of records. Both methods were recognized in *Yousoufian* I. 152 Wn.2d at 427, 435-36. Here, however, it is a distinction without a difference. Even if the Court employs the group method, each record should be "grouped" independently.

The plain language of the PDA indicates that the number of daily penalties should be based on each "record," not on "groups" of records. The PDA requires a penalty to be awarded "for each day that [a requester] was denied the right to inspect or copy said public record." RCW 42.17.340(4) (emphasis added). In *Yousoufian* I, the Supreme Court left it to a trial court's "discretion to assess penalties per record," although it also recognized that a court may choose not to do so when absurd results would follow. 152 Wn.2d at 436.[8]

Assessing a penalty per record is appropriate here because there is no reasonable means to group the records at issue. The trial court in *Yousoufian* I "arranged the withheld records into 10 groups based on time of production and subject matter." 152 Wn.2d at 427 (emphasis added). In this case, each non-exempt record would be classified

[8] The amount sought by Justice Sanders is in line with other recent awards under the PDA. In *Prison Legal News, Inc. v. State Corrections*, Thurston County Superior Court, Case No. 07-9-00600-4, the trial court

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into its own group because the records were produced at different times and because the documents that were produced at the same time all refer to separate subject matters.[9] Finally, the State claimed that many of the non-exempt records were exempt from production for many different reasons. *See* Appendix A and Appendix B to the Court's Opinion. Given the distinct production dates, subject matters, and reasons for exemption, none of the documents at issue can be grouped together.

ii. Number of Days

Determining the actual number of penalty days is a straight forward factual question; the Court must simply count the number of days between the date of request and production for each record. *Yousoufian* I, 152 Wn.2d at 437. As stated by the Supreme Court, the "PDA unambiguously requires a penalty 'for each day'" and the "[t]he PDA does not contain a provision granting the trial court discretion to reduce the penalty period." *Id.* Furthermore, penalties are "assessed from the time between the request and the disclosure." *Spokane Research,* 155 Wn.2d at 104. Here, the starting date is June 15, 2004, when Justice Sanders delivered his public records request to the State. The State did not "disclose," or produce, the three non-exempt Subsequent Production Documents until September 14, 2005. Justice Sanders is thus first entitled to penalties for 1,368 days as State wrongly failed to produce three records for 456 days. Second, the State did not

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penalized the state agency $541,154.69. In *Yousoufian II,* the Court of Appeals ruled that the trial court's award of a $15 per diem penalty for 8,252 days was insufficient. 137 Wn. App. at 80.

[9] With regard to the *In Camera* Documents, the non-exempt records concern such distinct matters as how to respond to Justice Sanders' PDA request (Document #30), the facts of Justice Sanders' visit to the Special Commitment Center (Document #32), cases pending before the Supreme Court in 2004 (*In Camera* Document #74), and the AGO's screening procedures (*In Camera* Document #94). As to the Subsequent Production Documents, even the State recognizes that they should be classified into separate groups. *See* Appendix B to the Court's Opinion (adopting the State's practice of separating some of the non-exempt

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provide Justice Sanders with an explanation of its claimed exemptions until November 4, 2005 when it filed its "Appendix A" with the Court. This is the date that the State disclosed the information required by the § .310(4) of the PDA. Accordingly, Justice Sanders is entitled to another 507 days of penalties. Finally, the State has not yet "produced" the six non-exempt *In Camera* Documents.[10] As of the date of this filing, however, Justice Sanders is owed penalties for another 6906 days, 1151 days for each of the six records. In total, the State must be penalized for 8781 days as of the date of this filing. Lawrence Fees Decl., ¶ 14, Ex. F.

iii. Amount of Daily Penalty

Within the statutory range of five to one hundred dollars, PDA penalties should be "based on an agency's culpability." *Yousoufian* I, 152 Wn.2d at 435. In *Yousoufian* II, the Court of Appeals held that the lower end of the scale should be reserved for cases of simple mistakes or ordinary negligence, where willful actions by an agency should draw the highest penalties available. 137 Wn. App. at 80.[11] Applying the *Yousoufian* II system

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documents into "Email communicating attorneys' selected facts, opinions" on one hand, and "Copy of cases, court rule" on the other).

[10] In its original opinion, the Court upheld the State's claims for exemption for "all but seven" of the *In Camera* Documents and "all be three" of the Subsequent Production Documents, for a total of ten documents. Upon reconsideration, the Court then ruled that *In Camera* Document #115 was actually exempt. Accordingly, this leaves six *In Camera* Documents and nine documents in total. However, the Court also stated that it was inclined to consider a few of these documents together given certain similarities or overlapping content. Justice Sanders does not have access to the *In Camera* Documents and thus cannot do his own comparison. Therefore, Justice Sanders respectfully maintains that to the extent that the non-exempt documents are anything but completely identical duplicates, the State is required to produce each record separately under the PDA, and should therefore, also be penalized separately for each record.

[11] The court in *Yousoufian* II set forth an en entire range of behavior corresponding to the range of potential penalties, as follows:

> [T]he minimum statutory penalty should be reserved for such instances in which the agency has acted in good faith but, through an understandable misinterpretation of the PDA or failure to locate records, has failed to respond adequately. Then, working up from the minimum amount on the penalty scale, instances where the agency acted with ordinary negligence would occupy the lower part of the penalty range. Instances where

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here, numerous factors indicate that the State committed "gross negligence", "wanton misconduct" and acted in bad faith, and should thus face a per diem penalty of approximately $70.

First, the State's continued violations of the PDA were not due to negligence, accident, or carelessness; they were the result of repeated informed choices made with the assistance of outside counsel upon repeated review of the material. Defendant State of Washington's Motion and Memorandum Seeking Summary Judgment at 9. The State then produced additional records on September 14, September 15, and September 27, and created two subsequent exemption logs. Lawrence Decl. (2005), ¶¶ 6-14. Accordingly, the State's continuing failure to produce the non-exempt *In Camera* Documents is the result of intentional decision-making. Furthermore, even though Justice Sanders' complaint specifically pointed out that the State had claimed exemptions "without explaining why the exemption applied," the State made no attempt to correct this violation through its subsequent logs. *See* Complaint for Injunctive Relief and Statutory Damages, at 3. Such intentional behavior exceeds the bounds of negligence, and can only constitute wanton misconduct. *Yousoufian II*, 137 Wn. App. 79, n. 15.

Second, the State's claims of exemption and legal arguments were made in bad faith. *See Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004) ("When deciding where, between $5 and $100 per day, the appropriate per day award should rest,

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> the agency's actions or inactions constituted gross negligence would call for a higher penalty than ordinary negligence, and instances where the agency acted wantonly would call for an even higher penalty. Finally instances where the agency acted willfully and in bad faith would occupy the top end of the scale.

137 Wn. App. at 80. (internal citations omitted).

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the court must consider whether the agency claimed an exemption in bad faith." (citing *Amren*, 131 Wn.2d at 35, 37)). Since Justice Sanders first made his request, the State has attempted to rely on an ever changing bevy of exemptions to avoid its duties under the PDA, citing the controversy exemption were no controversy existed and the attorney client privilege for records that were not attorney client communications.[12] The misuse of the attorney client privilege itself is indicative of bad faith. *See Hangartner*, 151 Wn.2d at 452 (ruling that "should an agency prepare a document for a purpose other than communicating with its attorney, and then claim that the document is protected by the attorney-client privilege, the requesting party might well claim that the agency has acted in bad faith." (internal citations omitted)). Even the State's CR 30(b)(6) witness, could not elucidate the State's claimed exemptions. Lawrence Decl. (2005), at Ex. A, 88:17 – 89:3.

Third, the nature of the Subsequent Production Documents suggest that the State may have intentionally withheld records to avoid embarrassment.[13] Justice Sanders is still being kept in the dark on the contents of the *In Camera* Documents and must therefore draw conclusions about the State's motives from the documents he has seen. Imposing the minimum statutory penalty may be appropriate when an agency is motivated by "concern for third party rights" or the privacy of others, not when the goal is to hide the inner

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[12] *See* Appendix A and B to the Court's Opinion. For a specific example, consider *In Camera* Document #94, TF-00884-86. The State originally claimed it was exempt pursuant to RCW 42.17.310(1)(j) (the controversy exemption). *See* the Entire Document Index. This did not change through the State's subsequent exemption logs. *See* Lawrence Decl. (2005) at Exs. E and I. Then, it is Appendix A, the State claimed that *In Camera* Document # 94 was also exempt pursuant to the attorney-client privilege, RCW 5.60.060(2). The Court rejected all such arguments, ruling that the "memorandum does not pertain to the litigation identified" and simply, that "RCW 5.60.060(2) does not apply." The State did not even identify any "client" that could potentially be receiving legal advice.

[13] For example, more than a year after Justice Sanders' request, the State produced emails containing such statements as "It's like Brutus said, 'If you're going to appose [sic] the king, you damn well better kill him."

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workings of state government. *ACLU v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 114-15, 975 P.2d 536 (1999). Such actions "fly in the face of the PDA and thus deserve the harshest penalties." *Yousoufian* II, 137 Wn. App. at 80.

All of these factors demonstrate the State's wanton misconduct and bad faith in responding to Justice Sanders' Request and suggest that the court should impose a penalty of approximately $70 for each day that the State was, and is, in violation of the PDA. Given the number of days discussed above, Justice Sanders is thus entitled to $614,670.00 in penalties as of this filing.

VI. CONCLUSION

For the above stated reasons, the Motion for Award of Penalties, Attorney's Fees, and Costs should be granted. According to the mandates of the Public Disclosure Act, Justice Sanders is entitled to an award of $614,670.00 in penalties and $191,348.06 for his attorney's fees and costs, for a total of $806,018.06.

DATED this 10th day of August, 2007.

KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP

By _____
Paul J. Lawrence, WSBA # 13557
Matthew J. Segal, WSBA # 29797
Graham M. Wilson, WSBA # 36857
Attorneys for Plaintiff
THE HONORABLE RICHARD B. SANDERS

Lawrence Decl. (2005), Ex. J; *see also* Ex. F ("Good job on this one ... let's hang on and see where it takes us. As Scott tells me, quoting Brutus, if you are going to attack the King, you better kill him.").

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APPENDIX A

Public Disclosure Act RCW 42.17	Recodified Public Records Act RCW 42.56
RCW 42.17.290 – Agencies shall adopt and enforce reasonable rules and regulations, and the office of the secretary of the senate and the office of the chief clerk of the house of representatives shall adopt reasonable procedures allowing for the time, resource, and personnel constraints associated with legislative sessions, consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information. Nothing in this section shall relieve agencies, the office of the chief clerk of the house of representatives from honoring requests received by mail for copies of identifiable public records. If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives shall retain possession of the record, and may not destroy or erase the record until the request is resolved.	**RCW 42.56.100** - Agencies shall adopt and enforce reasonable rules and regulations, and the office of the secretary of the senate and the office of the chief clerk of the house of representatives shall adopt reasonable procedures allowing for the time, resource, and personnel constraints associated with legislative sessions, consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information. Nothing in this section shall relieve agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives from honoring requests received by mail for copies of identifiable public records. If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives shall retain possession of the record, and may not destroy or erase the record until the request is resolved.
RCW 42.17.310(1)(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 42.56.290** – Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter.

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SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF THURSTON
HONORABLE RICHARD B. SANDERS, AN INDIVIDUAL
Plaintiff/Petitioner

vs
THE STATE OF WASHINGTON

No. 05 2 01439 1

DECLARATION OF EMAILED DOCUMENT (DCLR)

Defendant/Respondent

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 119 W. Legion Way, Olympia, WA 98501
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 19 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: 8/10/07 at Olympia, Washington.

Signature: Ingrid Y. Elsinga

Print Name: Ingrid Y. Elsinga

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APPENDIX II

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SUPERIOR COURT
THURSTON COUNTY, WASH

'07 JAN 12 P12:24

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SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

THE HONORABLE RICHARD SANDERS,

Plaintiff(s),

v.

STATE OF WASHINGTON,

Defendant(s).

NO. 05-2-01439-1

COURT'S OPINION

This matter is presented to the court on dual tracks. First the parties presented a stipulated order to show cause for hearing pursuant to RCW 42.17.340(2). My oral explanation at the time of hearing on February 10, 2006, tracks this order to show cause to the hearing on that date. After entry of the stipulated order to show cause, each party moved for summary judgment pursuant to CR 56. Those cross motions also came to court for argument on February 10. Judicial review of public disclosure requests may be had either pursuant to RCW 42.17.340(2) or CR 56, and in both the review may be based solely on affidavits or declarations. Nevertheless, the distinction between statute and court rule is important. Under RCW 42.17.340(2) a court may enter findings of fact based upon evidence presented at the hearing, even if that evidence is solely by affidavit or declaration. Under CR 56 fact finding is not permitted and the evidence is viewed in the light most favorable to the non-moving party. At the beginning of the hearing, I opined that disputed issues of

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material fact precluded entry of summary judgment for either party and that consideration of the issues presented would be had pursuant to the show cause procedure in §.340(2). At the conclusion of oral arguments, each party was given the opportunity to request an additional evidentiary hearing. Justice Sanders declined the opportunity; the Attorney General's Office accepted only conditionally – and that condition is not applicable to the grounds upon which this case is decided.

This court uses the following terminology in discussion of public records arguably subject to a Public Disclosure Act request:

- Records are either disclosed or not disclosed. A record not disclosed means that its existence was not made known to the PDA requestor in the PDA response.
- Disclosed records are either produced (made available for inspection and copying) or claimed exempt from production in the PDA response. (Additionally, where production of a specifically identified document is demanded in the PDA request and is therefore disclosed in the request, the responding agency may deny that the document is a public record and so refuse to produce the record.)
- A public record encompassed by a PDA request is never exempt from disclosure.
- A claim for exemption from production may be either valid or invalid, and that determination is reserved to the courts.

Consideration of the issues in this case begins with the Public Disclosure Act request authored by Mr. Bulmer on behalf of Justice Sanders and received by the AGO on June 17, 2004. Response to the PDA request was made by the AGO on July 8, 2004, by disclosure of all public records at issue in this case. Some disclosed records were produced; others were claimed exempt and not produced. Of that latter group, some records were produced after this lawsuit was filed on July 22, 2005. The AGO has not disclosed any public records after the July 8, 2004, disclosure; and Justice Sanders has not identified or described any public records he believes were subject to his request and not disclosed. Nevertheless, Justice Sanders contends that the AGO's disclosure of public records to him on July 8, 2004, violated the PDA. This contention is premised on the belief that Mr. Bulmer received disclosure of only those records disclosed pursuant to a nearly concurrent PDA request by Mr. Ford. In response, the AGO acknowledges that it did not do a separate public records search in response to Mr. Bulmer's request, but it argues that Mr. Ford's request was broader than Mr. Bulmer's and encompassed

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all of the public records covered by Bulmer's request. The AGO also argues that its representative and Mr. Bulmer made an enforceable oral agreement amending Bulmer's request to be exactly co-extensive with the state's disclosure to Mr. Ford (defendant's memorandum, p. 6). Accordingly, the first issue addressed is whether the AGO's disclosure to Justice Sanders complied with the law and was based upon a legally sufficient search for public records.

Sufficiency of Search and Disclosure

I conclude that the AGO made a legally sufficient search for public records in response to Mr. Bulmer's request and that its disclosure complied with the PDA.

Attorney Timothy Ford submitted a PDA request to the AGO on April 4, 2004. His request referenced the Commission on Judicial Conduct case number 4072-F-109, the case concerning Justice Sanders then pending before the CJC. As the CJC decision makes clear, the complaint encompassed the period of time around the visit by Justice Sanders to the SCC on January 27, 2003, beginning with the invitation on December 17, 2002, and continuing through at least May 12, 2003, when Justice Sanders recused himself from the *In re Detention of Thorell* appeal. The CJC complaint was filed on March 19, 2003, so the CJC investigation and subsequent decision extended to events well after the filing of the complaint.

The scope of Mr. Ford's request was explained in five bulleted descriptions, beginning:

- All records and communications sent and received with the Commission on Judicial Conduct related to the above matter including Commission Board Members and staff members.

This first description was subsumed by a boarder statement in the second:

- All records and communications sent and received with any person or entity related to the above matter.

Then followed three bulleted items only indirectly related to the complaint to the CJC or action by the CJC. These three items addressed the matter of representation before the CJC:

- All records and communications related to a request for representation by or on behalf of Justice Sanders related to the above matter.
- All records and communication related to Kate Pflaumer being selected as counsel for the prosecution of the above matter.

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- All internal records and communications from the Office of Attorney General related to the above matter or any request for representation on the matter.

Upon receipt of the Ford request, the AGO undertook its response and completed that on July 8, 2004, without complaint or objection.

During the intervening period, Mr. Bulmer filed his request, the subject of which was identified as Justice Richard Sanders. There are two parts to the request in Mr. Bulmer's letter. The first part requests:

> [A]ll records related to a visit by Justice Richard Sanders to the Special Commitment Center on McNeill Island January 27, 2003, and subsequent actions by the Commission on Judicial Conduct in regards to this visit. This records request includes records both before and after the visit, the planning for the visit and follow-ups after the visit.

The second part of the request in Mr. Bulmer's letter cast its net far beyond the AGO. Included in that part, was the following as it relates to the AGO:

> Please provide all [sic] document related to such matters including but not limited to: all records and communications to or from anyone at DSH with . . . anyone at the Washington State Attorney General's office . . . regarding in any way the visit by Justice Sanders to the Special Commitment Center on McNeill Island and/or regarding in any way the Commission on Judicial Conduct in regards to Justice Sanders.[1]

The first part of Mr. Bulmer's request encompasses the visit, including planning and follow-up, and subsequent actions by the CJC. These two elements – the visit and the subsequent actions – are redundant because the CJC's subsequent actions included the investigation that encompassed the period from the invitation to Justice Sanders on December 17, 2002, to his recusal on May 12, 2003. The second part of Mr. Bulmer's request is equally broad – it seeks records regarding in any way the visit by the Justice or the CJC's actions – but it is directed, in relevant part, to records and communications to or from anyone at DSHS with . . . anyone at the Washington State Attorney General's office . . ..

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[1] In this passage, Mr. Bulmer requested all records and communications to and from anyone at DSH with anyone else and thereafter listed a number of state agencies, including the AGO. He also requested all internal records and communications of DSHS regarding this matter. Ms. Jensen, the AGO public records officer, declared that she contacted Mr. Bulmer and explained that the AGO would respond by disclosing its public records, but that Mr. Bulmer's request to other agencies under the Public Disclosure Act should be directed to those agencies. It is not clear whether Mr. Bulmer made such additional requests, but that aspect of his request is not part of this case.

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When Mr. Bulmer's request is compared to Mr. Ford's request for all records and communications sent and received with any other person or entity to the above matter, it is evident that there is no significant difference between the two; neither is measurably broader than the other. Mr. Ford's letter then requests records concerning the issue of representation for the parties before the CJC. That is a conspicuous addition to his request, one not mentioned in Mr. Bulmer's request. Viewed in this light, Ms. Jensen, AGO's public records officer, reasonably concluded that Mr. Ford's request was broader than Mr. Bulmer's. The first part of Mr. Bulmer's request focuses on the Justice's visit on McNeill Island and subsequent actions by the CJC. The record here does not disclose that the CJC was concerned with Justice Sanders' defense costs; that was a matter between an elected official of the state and the state. The second part of Mr. Bulmer's request is very broad, but is focused on records passing between DSHS and the AGO. The record does not disclose that DSHS was concerned with Justice Sanders' defense costs. Accordingly, I find that Mr. Ford's request was broader than, or at least as broad as, Mr. Bulmer's request.

I find that after receipt of the two requests, the AGO completed its record search and review, and on July 8, 2004, disclosed to Mr. Ford and Mr. Bulmer all the same records. The AGO produced the same records to each and claimed the same exemptions as to each.

The parties dispute the details of communication between Ms. Jensen and Mr. Bulmer between the time of his request and the AGO's disclosure; the AGO contends an agreement was reached, Justice Sanders denies that. I make no findings about this issue because it is not material to the decision in this case. It is not material to this case because I conclude that under the PDA an agency that receives two concurrent requests[2] for the same records discharges its responsibility for each request if it makes one legally sufficient search and discloses the same records to each. This conclusion applies where the two requests direct a search for the same records during the same time period, as here. If one request directs search of a slightly larger universe of records, the agency

[2] Concurrency of request does not mean that two requests must be received on the same day. Rather, they may be reasonably contemporaneous but must encompass the same timeframe. Such was the case here, the search was concluded and the disclosure, production, and claims for exemption were made to both parties on the same day.

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discharges its responsibility to each requestor if it makes one search and discloses the results of the broader search to each. As noted at the beginning of this section, I conclude that the AGO made a legally sufficient search for public records in response to Mr. Bulmer's request and that its disclosure complied with the Public Disclosure Act. These conclusions do not rely on any purported agreement between the parties and so no findings are made on that allegation.

The disclosure to Justice Sanders (and Mr. Ford) was in the form of an Entire Document Index that disclosed the existence of 334 public records. Concurrently with disclosure, 216 records were produced, and of these 26 had portions redacted, based upon claims of exemption. The remaining 118 records were not produced in any form, also based upon claims of exemption. The claims for exemption appeared in a column of the Entire Document Index labeled Privilege. The vast majority of the 144 public records claimed to be totally or partially exempt from production bore the single notation RCW 42.17.310(1)(j) in the Privilege column. Justice Sanders contends that this extremely brief form of exemption claim does not comport with RCW 31.17.310(4), which provides:

> Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.

He contends that the AGO must rely only on the information provided at the time of disclosure, July 8, 2004, and if that is inadequate, must produce the records.

Adequacy of the Claim of Exemption

I find that the AGO has identified a basis for each claim of exemption asserted in the Entire Document Index. In most instances the claim is identified as being made pursuant to RCW 42.17.310(1)(j), though in some instances more than one statute is identified.[3] I conclude that the part of §.310(4) requiring a statement of the specific exemption has been adequately satisfied.

[3] In several instances the Privilege column lists "Redacted – Not Responsive to Scope of Request" as the reason for a redaction. While this is not a basis for exemption, it is permissible to redact from a public record information that is not within the scope of the PDA request. *In camera* examination of that redacted material confirms that it is outside the scope of Justice Sanders' request.

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It is settled law that an agency may claim additional or different exemptions during judicial review. In *PAWS v. UW (II)*, 125 Wn.2d 243, 253 (1994), the Supreme Court rejected the contention that an agency should be limited to arguing only those exemptions identified in the agency's initial response.

I conclude that the part of §.310(1)(j) requiring a brief explanation of how the exemption applies to the record withheld has not been satisfied. It is clear that the Entire Document Index is devoid of any explanation.

The phrase brief explanation is not further defined in §.310(4), and this responsibility has not been specifically addressed in any appellate decision brought to my attention. However, where no explanation at all is offered by the agency, it is clear that the agency has failed to comply with this requirement.

The PDA does not provide a specific consequence for failure to provide the required brief explanation. Significantly, the PDA does not compel production of public records, otherwise exempt from production under §.310(1), because of an agency's failure to comply with the brief explanation requirement of §.310(4) or any other provision of the PDA. No provision of the PDA or judicial construction thereof causes an exempt public record to lose its exemption by reason of agency action or inaction in response to a request for inspection. Instead, the PDA provides recourse to the courts for the requesting party, places the burden of proof on the agency, and permits very significant penalties to be imposed against any agency that wrongfully withholds production of a public record.

I note this important principle because Justice Sanders[4] argues, albeit indirectly, that he is entitled to production of all records by reason of the AGO's failure to provide the required brief explanation in the Entire Document Index on July 8, 2004. He argues that the AGO is precluded from offering any explanation for the claimed exemption other than the one offered at the time of

[4] Justice Sanders is identified as the party advancing this argument in keeping with modern court practice that identifies parties by names or unique identifiers rather than the generic designations of plaintiff and defendant. The acts, arguments, and contentions attributed to Justice Sanders were all made by his attorneys acting in his behalf.

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initial disclosure. Since no explanation other than identification of the claimed exemption was offered initially, he argues that the AGO cannot meet its burden of proving that any of its claims for exemption is in accordance with §.310(1)(j). Justice Sanders objects to the directive from this court that permitted the AGO to provide such explanation.

I am not persuaded by this argument. I conclude that the AGO's violation of the brief explanation requirement in §.310(4) does not entitle Justice Sanders to production of otherwise exempt public records and does not preclude this court from requesting an explanation for consideration during *in camera* examination. I conclude that the remedy for the AGO's violation of §.310(4)[5] is consideration of costs, attorneys fees, and penalties pursuant to RCW 42.17.340(4).

In *Citizens v. Dept. of Corrections,* 117 Wn. App. 411 (2003), the Court of Appeals considered a case where the agency failed to identify any exemption provided in §.310(1) and failed to provide any brief explanation for withholding production of numerous records. The Court of Appeals found a violation of §.310(4) but nevertheless permitted the agency to assert the exemption provided in §.310(1)(a) and assumed, without deciding, that the exemption applied. The Court of Appeals imposed the penalty provisions of §.340(4) for the violation, but did not require production of the records as a penalty.

Having concluded that the AGO conducted a legally adequate search and disclosure of public records on July 8, 2004, and having concluded that the AGO may provide to the court an explanation of its claims for exemption for use during *in camera* examination, I next turn to assessment of each public record claimed exempt. These records are considered in two groups, but the standards for judging each are the same.

The first group of records are those still withheld from production and submitted for *in camera* review. The second group is 33 records[6] initially claimed exempt but then subsequently

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[5] The violation of §.310(4) applies only to those exemptions asserted under §.310(1), not exemptions asserted under a different statute – e.g., RCW 50.60.060(2).

[6] In materials submitted to the court, Justice Sanders claimed as many as 70 records were included in the supplement productions in September 2005. However, in his letter dated February 14, 2006, Mr. Leyh explained the supplemental productions and identified duplicate claims for exemption, duplicate records, and five records from which portions were redacted because the information was outside the scope of the PDA request. He concluded that there were 33 actual records

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produced after Justice Sanders filed this lawsuit. Justice Sanders argues that the subsequent production of the records should be treated as evidence that the initial claims for exemption were wrongful, and urges the court to find that each claim was a violation of the PDA which entitles Justice Sanders to costs, fees, and penalties under RCW 42.17.340(4).

I am not persuaded by this argument. I find that when Justice Sanders' lawsuit was filed a year after the initial production, the AGO retained independent who reviewed all of the records previously withheld.[7] Independent counsel determined that some records should be produced to Justice Sanders in order to reduce the extent of the conflict raised by his lawsuit. The transmittal letters accompanying the subsequently produced records reserved the claims for exemption. I find this explanation by the AGO credible.

The AGO argues that an agency should not be penalized for voluntarily producing records after a claim of exemption unless the claim was wrongful. I agree. The goal of the PDA to foster liberal disclosure of public records is fostered when an agency is permitted to later disclose validly exempt records when the agency has no interest in continuing to withhold the records. This is especially true when a considerable period of time has passed between the initial claim of exemption and later production of the record. Conversely, the goal of the PDA is stifled if any voluntary production after initial claim of exemption results in penalties to the agency. The better approach is judicial review of the initial claim of exemption. I conclude that if the claim of exemption was wrongful, the agency should be penalized under 340(4) up to the date of voluntary production, but if the claim is sustained, the agency should suffer no penalty.

In this case, I have reviewed the claims for exemption of the 33 subsequently disclosed records, using the same standards applied to the records reviewed *in camera*.

claimed exempt but produced in order to minimize matters in dispute. I have reviewed Mr. Leyh's letter and find it reliable. Accordingly the 33 records identified on page 3 of the letter are those reviewed by the court in this second group.

[7] This lawsuit was filed July 22, 2005; the amendment adding the one year statute of limitations in RCW 42.17.240(6) did not become effective until two days later.

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Standards for Application of RCW 42.17.310(1)(j)

Nearly all of the AGO's claims for exemption are made pursuant to RCW 42.17.310(1)(j), the work product exemption. That subsection provides:

> [The following are exempt from public inspection and copying:] 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 Superior Courts.

To prevail on its claims for exemption, the AGO must prove that the document is relevant to completed, existing or reasonably anticipated litigation (*Dawson v. Daly,* 120 Wn.2d 782, 791 (1993)) and that the records requested are work product (*Limstrom v. Ladenburg,* 136 Wn.2d 595, 612 (1998)).

I conclude that the litigation identified by the AGO as justification for its reliance upon §.310(1)(j) is litigation that fits comfortably within the judicially developed standards for relevant to a controversy as that phrase is used in the statute. In the disclosed portion of this record, the AGO supplies evidence that there were controversies encompassed by §.310(1)(j) during the time when the records withheld from production were created and at the time their production was requested by Justice Sanders. That evidence is contained in the declarations of Batten[8] and Thomsen. While Ms. Batten's declaration identifies generally the completed, existing, or reasonably anticipated litigation alleged to be the basis for the claimed exemption, Mr. Thomsen's declaration attaches documents that specifically identify the litigation in question. They are:

- *In Re Detention of Thorell*, 149 Wn.2d 724, decided on July 10, 2003. This was litigation before the Supreme Court at the time Justice Sanders participated in the visit to the SCC on January 27, 2003.
- *In Re Detention of Spink*, a petition for review from a Court of Appeals decision filed June 21, 2002. This petition was being held pending a decision in the *Thorell* case. On September 30, 2003, the petition for review was granted by the Supreme Court and then immediately remanded to the Court of Appeals on the authority of *Thorell*. The Judicial

[8] Declaration of Shirley Batten, p. 2-3: "During the meetings, we reviewed certain documents and discussed why, in each instance, a document was not subject to production based on an exemption under the PDA. For instance, when a document was potentially subject to the 'controversy' exemption, RCW 42.17.310(j), the employees familiar with the document's creation would identify the reasonably-anticipated or pending lawsuit and the relationship between that controversy and the document. The various 'controversies' included, among others, several pending cases involving persons detained at the McNeil Island Special Commitment Center ("SCC") and Justice Sanders' declaratory action against the State in which he sought a publicly-funded defense in the disciplinary proceedings brought by the commission on Judicial Conduct ("CJC")."

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Conduct Commission found that Justice Sanders had accepted documents from Mr. Spink at the time of the visit to the SCC.

- *Sanders v State of Washington*, Thurston County No. 04-2-00699-3. This litigation was initiated on April 12, 2004, following the complaint to the CJC filed March 19, 2003.

I find that litigation in the first two cases was ongoing when all of the withheld records were generated and when the PDA request was made and exemption claimed. I find that litigation in the third case was ongoing when the PDA request was made and exemption claimed. Further, I find that anticipated litigation in the third case was reasonable at the of the CJC complaint on March 13, 2003. Anticipation of such litigation was reasonable based upon the history of a similar suit arising from an earlier CJC complaint against Justice Sanders.[9]

I conclude that each of the three items was a controversy within the meaning of 310(1)(j). Accordingly, for *in camera* examination of each record where 310(1)(j) is asserted as a basis for exemption from production, the first test must be whether the record is relevant to one of the three controversies. That determination is made separately for each record, *in camera.*

If the record is determined to be relevant to one of the three controversies, the court must then determine whether the record is entitled to the protection of the work product doctrine, again *in camera.*

Standards for the Work Product Doctrine

The work product doctrine is a common law doctrine codified in CR 26(b)(4). It provides, in relevant part:

> [A] party may obtain discovery of documents . . . prepared in anticipation of litigation or for trial by or for another party . . . 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.

[9] In contrast to what the State seems to imply in its Reply Brief, page 14 ("At the time of the communications at issue, the State reasonably anticipated . . "), the language of §.310(1)(j) seems to provide for application of the test at the time of the PDA request, not the time when the record was created. This court need not decide that issue, for in camera examination reveals that each record examined was created after the date when at least one of the three controversies started.

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By the terms of this court rule, a party may obtain discovery of materials prepared in anticipation of litigation only if that party can show substantial need and an inability to obtain the information elsewhere. Even if such showing has been made, a court is directed to protect from disclosure the categories listed in the last sentence of the rule.

The PDA is a strongly worded mandate for broad disclosure of public records. *Hearst v. Hoppe*, 90 Wn.2d 123, 127 (1978). The provisions of the PDA are to be construed broadly, and its exceptions narrowly. Nevertheless, the PDA does not require that the work product doctrine be construed or applied differently than it would be in litigation discovery under the civil rules. *Soter v. Cowles Publishing Co.*, 131 Wn. App. 882, ¶18 (2006) (work product under the Public Disclosure Act is the same as work product under the civil rules.)[10] This principle is further acknowledged in the Washington Supreme Court's discussion of the work product doctrine in *Limstrom v. Ladenburg*, 136 Wn. 2d 595, 609-612 (1998).

The standards for determining second test of §.310(1)(j), application of the work product rule, during *in camera* examination are:

- There are two categories of work product: (1) factual information; and (2) attorneys' mental impressions, research, legal theories, opinions, and conclusions.
- Correspondence and notes of discussions with others created or gathered during preparation for litigation are included with mental impressions in the opinion work product category.
- A court may allow an adverse party to discover factual information gathered by an attorney upon a showing of substantial need for the information in preparing the party's case and an inability to obtain the substantial equivalent without undue hardship.
- Attorneys' mental impressions, research, legal theories, opinions, and conclusions enjoy nearly absolute immunity. A court may release this work product only in very rare and extraordinary circumstances.
- Work product documents need not be prepared personally by an attorney; they can be prepared by or for the party or the party's representative, so long as they are prepared in anticipation of litigation.

Soter v Cowles Publishing Co., 131 Wn. App. 882, ¶17-¶22 (2006). In *Soter*, the Court of Appeals declared:

[10] One important exception to this general principal is that the party seeking disclosure under the PDA does not have to show substantial need. Need or purpose in seeking disclosure is never an issue and the burden of proof never shifts from the agency.

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> The attorney work product doctrine . . . is intended "to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." Citing *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir.1998) (quoting *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S.Ct. 385, 91 L.Ed. 451 (1947)).

Soter, at ¶17.

There is little dispute, if any, about the standards for applying the attorney-client privilege; although there is substantial dispute about the application of the privilege as to most of these records. The language of RCW 5.60.060(2)(a) provides:

> An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

Neither the language of the statute nor case law construing the privilege limits the privilege to communications between an attorney and client, or between two attorneys serving the same client, that convey legal advice. Once an attorney-client relationship exists, any communication arising from that relationship is privileged, unless waived or controlled by a recognized exception to the privilege.

I conclude that the common interest doctrine is recognized in Washington and is properly applied to many of the communications between the AGO and members of the King County and Snohomish County prosecuting attorney offices. Justice Sanders is correct in arguing that the doctrine only applies to PDA exemptions when there is an underlying exemption recognized in the PDA. I have applied that standard here.

With the foregoing principles in mind, I have undertaken *in camera* review of the 115 records submitted. I directed the AGO to provide the court and Justice Sanders with an expanded explanation of the claim for exemption as to each record; and I permitted Justice Sanders to respond in the same document. From that document I have created *Appendix A – Claims for Exemption, Notes of the Parties and Court's Decisions*, which includes the AGO's explanations, Justice Sanders' response, and my decision. The appendix is attached and made part of this *Court's Opinion*. The AGO's claim for exemption has been sustained for all but seven of the records. The claims for exemption of Documents #30, #32, and #94 are denied. The claims for exemption of Documents #72 and #115 are partially denied. The claims for exemption of Documents #103 and

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#104 are denied, but they are duplicates of #94 and #30 respectively. For purposes of considering the penalties, if any, that should be assessed against the AGO pursuant to RCW 42.17.340(4), there are five records ordered to be produced.

I have also undertaken examination of the 33 records submitted to me as the *Supplemental Production Notebook* in a manner akin to *in camera* examination. I have stated my decisions on these records in *Appendix B – Court's Decisions*, which is attached and made part of this *Court's Opinion*. The AGO's initial claim for exemption has been sustained for all but three of the records. The claims for exemption of Documents #3 (partial denial), #32, and #57 are denied. Document #32 is part of *in camera* review Document #72, and the two should be considered as one record for purposes of §.340(4).

All issues of costs, fees, and penalties under RCW 42.17.340(4) have been reserved for later. Justice Sanders may initiate that process by motion.

DATED: January 12, 2007.

Wm. Thomas McPhee, Judge

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Appendix A – Claims for Exemption
Notes of the Parties and Court's Decisions

***DOCUMENT #1**, TF 00010: Attorney-Client Privilege*

This document consists of an e-mail exchange between Assistant Attorneys General ("AAGs") responsible for advising the Department of Health & Human Services ("DSHS"), with the third paragraph redacted from the 4/5/04 email under the attorney-client privilege, RCW 42.17.260(1) and RCW 5.60.060(2). In the redacted paragraph, Senior AAG Bill Williams describes to Senior AAG Rochelle Tillett a communication between himself and AAG Tim Lang with Steve Williams, the Public Information Officer for the Special Commitment Center ("SCC"). The privilege applies because DSHS is the client of AAGs Bill Williams, Tim Lang, and Rochelle Tillett, and the communications relate to confidential advice provided by the attorneys regarding DSHS's position. See EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 196 ("It would seem self-evident that when two or more lawyers represent one client anything that the client says in their presence or that they say to each other about the client's affairs must necessarily be as privileged as if it were said to a single lawyer.").

PLAINTIFF'S RESPONSE TO DOCUMENT #1:

The redacted portions of Document #1 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof that the attorney-client privilege applies to Document #1, and (2) the State waived its right to assert the attorney-client privilege regarding Document #1.

Moreover, the State does not claim the advice discussed in the document was legal in nature. The attorney-client privilege does not apply to confidential advice unless the advice was legal in nature. A document is not exempt from civil discovery simply because it was created by an attorney; the attorney-client privilege is a narrow exemption that only protects actual legal advice. *See Chen*, 99 F.3d at 1501; *Hangartner v. City of Seattle*, 151 Wn.2d at 452; *Cf. Seventh Elect Church in Israel v. Rogers*, 102 Wn.2d at 531.

Court's notes: Sustained on attorney-client privilege grounds. Counsel for Justice Sanders does not accurately state the law of the privilege in the Response. The attorney client-privilege, RCW 5.60.060 provides:

> (2)(a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

The limitation announced in *Hangertner* is that the privilege does not extend to documents prepared by a client for purposes other than communicating with an attorney; the limitation in *Chen* is a narrow exception to what is otherwise an expansive view of the privilege – the exception applies when the client hires an attorney for purposes other than legal advice or representation.

***DOCUMENT #2**, TF 00020 – 24: Controversy Exemption and Attorney-Client Privilege*

This document consists of two "Weekly Legal Briefing" memoranda from Bill Williams, Acting Division Chief for the DSHS Division of the Office of the Attorney General, to Dennis Braddock, DSHS Secretary. The memoranda summarize legal developments in various cases involving DSHS, and the first one, under "SCC Miscellaneous," discusses Justice Sanders's expressed desire to visit the SCC, in the context of numerous sexual violent predator cases pending in Washington appellate courts including the Washington Supreme Court.

The memoranda in general reflect the opinions, mental impressions, and anticipated case strategy of counsel in current and reasonably anticipated cases in which the State was a party, and are exempt from disclosure based on the attorney-client privilege, RCW 42.17.260(1) and RCW 5.60.060(2), and the "controversy" exemption, RCW 42.17.310(1)(j). Certain parts, including the discussion of a tour of SCC by Justice Sanders, do not refer to specific pending cases, but it can be reasonably inferred that the reference to SVP cases pending in the Washington Supreme Court means "controversies" to which the State was a party, including In re the Detention of Bernard Thorell, No. 69574-1 ("Thorell "), In re the Detention of Ralph Spink, No. 73082-2 ("Spink"), and other pending cases filed by residents of SCC. Other portions of the weekly reports consist of factual information provided to keep the client posted on potential legal developments and implications. Although initiated by the attorney, the reports nonetheless are protectable as attorney-client communications. See Hercules v. Exxon, 434 F. Supp. 136, 144 (D. Del. 1997) ("[S]elf-initiated attorney communications intended to keep the client posted on legal developments and implications, may also be protected.").

PLAINTIFF'S RESPONSE TO DOCUMENT #2:

Document #2 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof that the Controversy Exemption or the attorney-client privilege applies to Document #2, and (2) the State waived its right to assert the attorney-client privilege regarding Document #2.

Additionally, by requesting that the Court make inferences, Appendix A explicitly recognizes that the State lacks the necessary evidence to justify applying the Controversy Exemption to Document #2. A party invoking a privilege bears the burden of proof and, therefore, must include the applicable facts in an affidavit, not merely rely on the face of the documents. *Int'l Paper Co.*, 63 F.R.D. at 94; *Local 851*, 36 F. Supp.2d at 129; *In re Tex E. Transmission*, 1991 WL 87218 at *2; *Delco Wire*, 109 F.R.D. at 688; Rice, *Attorney Client Privilege in the United States*, § 11:10.

Moreover, to the extent the document reflects communications about the facts, plans or ethical implications of Justice Sanders's visit to the SCC, the document would not be subject to the Controversy Exemption or attorney-client privilege. The attorney generals involved do not and could not be involved in providing legal advice or work product because they are not assigned to the Commission on Judicial Conduct, and thus were not acting as attorneys in anticipation of any Commission proceedings.

Court's notes: Sustained on either §.310(1)(j) or RCW 5.60.060(2)(a) grounds.

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***DOCUMENT #3**, TF 00046: Controversy exemption*

The document withheld is a short, undated, handwritten note by Shirley Battan, a Deputy Attorney General regarding the CJC charges against Justice Sanders relating to his visit to the SCC, Justice Sanders's position, his request for the State to provide counsel to defend against CJC charges, and the State's position. It contains the mental impressions of a Deputy AG with respect to a reasonably anticipated "controversy" referenced in the notes, i.e., a suit by Justice Sanders against the State for defense costs.

PLAINTIFF'S RESPONSE TO DOCUMENT #3:

Document #3 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) neither element of the Controversy Exemption are not adequately established as regard to Document #3.

Additionally, the State claims that Document #3 relates to a "controversy" with Justice Sanders over his request for the State to provide him a defense before the Commission on Judicial Conduct relating to his visit to the SCC. However, the State's Original Exemption Log dates Document #3 to 00/00/2000. *See* Lawrence Decl. (November 28, 2005), Ex. C at 3. Justice Sanders did not visit the SCC until January 27, 2003, he did not ask the State to provide him a defense until November 23, 2003, and did not file his lawsuit asserting that the State must provide him a defense until April 12, 2004. The State has failed to prove, and indeed, it is difficult to imagine, that Document #3 relates to a "controversy," as defined in *Hangartner,* 151 Wn.2d at 450.

The State also fails to satisfy the second element of the Controversy Exemption because the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Finally, the State has not identified Shirley Battan's assigned AG responsibility at the time the document was created. In other words, there is no claim as to which agency Ms. Battan was acting as a lawyer. AGO documents are not per se protected. The AG must either be giving advice to a client (an agency) or preparing work product for specific client (agency) controversy. A document is not exempt from civil discovery simply because it was created by an attorney; the attorney-client privilege is a narrow exemption that only protects actual legal advice. *See Chen,* 99 F.3d at 1501; *Hangartner v. City of Seattle,* 151 Wn.2d at 452; *Cf. Seventh Elect Church in Israel v. Rogers,* 102 Wn.2d at 531.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #4**, TF 00048 – 51: Controversy exemption.*

These four pages consist of an e-mail string between AAGs, the Solicitor General and the Chief Deputy Attorney General, with respect to a draft letter to be sent to C.J. Merritt, Supreme Court Clerk, in response to his letter to counsel in In re the Detention of Bernard Thorell. The e-mails reflect the mental impressions, conclusions, and analysis of attorneys about changes to be made to the letter, and the potential effects of the SCC visit on cases pending in the Washington Supreme Court, including Thorell, Spink, and a Division III case regarding Keith Rogers. As such, the communications

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clearly are work product and fall within the controversy exemption, RCW 42.17.310(1)(j).

PLAINTIFF'S RESPONSE TO DOCUMENT #4:

Document #4 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the second element of the Controversy Exemption is not established, and (3) the State may not rely on the work product doctrine.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #5**, TF 00054 – 57: Controversy Exemption*

This is an e-mail string included within Document 4, TF 00048-51, but also including an interlineated draft of the letter to Mr. Merritt. The interlineations on the draft letter reflect the internal mental processes and reasoning of the AAG. The "controversy" is the Thorell and Spink cases, which are referenced in the letter itself. See EPSTEIN, supra, at 137 ("It is hardly surprising that drafts of documents, which so clearly reflect and disclose an attorney's mental processes and reasoning, are protected from compelled disclosure."); Alexander v. Federal Bureau of Investigation, 198 F.R.D. 306, 312 (D.D.C. 2000); Blumenthal v. Drudge, 186 F.R.D. 236, 243 n.8 (D.D.C. 1999).

PLAINTIFF'S RESPONSE TO DOCUMENT #5:

Document #5 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #5. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Documents are not exempt from disclosure merely because they are drafts. A number of courts have held that there is no expectation of confidentiality in the drafts of documents prepared for disclosure to third parties. *See, e.g., United States v. Under Seal (In re Grand Jury Proceedings)*, 33. F.3d 342, 354-55 (4th Cir. 1994) (holding that, "the attorney-client privilege does not attach to documents prepared with the intention of public disclosure."); *United States v. Under Seal*, 748 F.2d 871, 977 (4th Cir. 1984) (finding that drafts of documents relating to a public transaction which could reasonably be expected to be imparted to a third party were not protected by privilege); Paul Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated*, 48 Am. U. L. Rev. 967 (1999). A draft document is also not privileged insofar as it is identical to the final version of the document which was submitted to a third party. *Andritz Sprout-Bauer, Inc., v. Beazer East, Inc.*, 174 F.R.D. 609 (M.D. Pa. 1997); *Gutter v. E.I. Dupont de Nemours & Co.*, 1998 WL 2017926 at *6 (S.D. Fla. 1998); *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 225 (Tenn. Ct. App. 2002). Furthermore, any portions of a draft document that were ultimately included in a final draft and distributed outside the attorney-client relationship "lack the required element of confidentiality and are not privileged." *MessagePhone, Inc., v. SVI Systems, Inc.*, 1998 WL 874945 (N.E. Tex.

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December 8, 1998). If this document, or portions thereof, is identical to a final draft which was sent to third person, then it is not privileged and was wrongly withheld from production.

Court's notes: Sustained on §.310(1)(j) grounds. Justice Sanders argues attorney-client privilege, but that is not asserted by the AGO.

***DOCUMENT #6**, TF 00074-79: Controversy Exemption*

This document is an e-mail string between AAGs, the Solicitor General, the Chief Deputy Attorney General and the Executive Assistant to Attorney General Christine Gregoire that forwards and discusses issues in a memorandum dated Jan. 14, 2005, from AAG Todd Bowers to Attorney General Christine Gregoire and Chief Deputy Attorney General Kathy Mix (copied to other AAGs). The memorandum addresses the SCC visit by Justice Sanders and related issues in the context of pending Washington Supreme Court cases involving parties with whom he had ex parte contacts at the SCC. The memorandum and emails reflect the mental impressions and analysis of attorneys with respect to the Thorell, Spink, and other "controversies" before the Washington Supreme Court to which the State was a party. The documents are thus exempt from disclosure under RCW 42.17.310(1)(j). See Newport Pac. Inc., v. County of San Diego, 200 F.R.D. 628, 634 (S.D. Cal. 2001) ("To the extent that the information at issue here is County Counsel's analysis of issues for presentation to the Board at closed session where the Board makes policy and strategy choices on litigation, the information is attorney work product, and therefore protected from disclosure.").

PLAINTIFF'S RESPONSE TO DOCUMENT #6:

Document #6 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #6, and (3) the State may not rely on the work product doctrine.

Moreover, to the extent that the memorandum addresses issues unrelated to consideration of a recusal motion in a pending case, the State has not identified a controversy that would justify an exemption from disclosure and production. Thus, for example, to the extent that the memorandum addresses factual descriptions of Justice Sanders visits or the Attorney General's decisions regarding participation in the visit, instructions to SCC personnel about how to proceed during Justice Sanders visit, or like issues unrelated to legal advice or work product regarding the specific issue of recusal, the memorandum should be produced in redacted form.

Court's notes: Sustained on §.310(1)(j) grounds. There are not parts that lend themselves to production by redaction of other parts. §.310(1)(j) applies to all of the email and memorandum.

***DOCUMENT #7**, TF 00080: Controversy Exemption*

This document is an e-mail string between Chief Deputy Attorney General Kathy Mix and various AAGs regarding the Memorandum included in TF 00074-79, and reflecting additional legal research regarding recusal procedure. The "controversy"

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consists of the pending cases in which the State was a party, where the recusal of Justice Sanders was a potential issue as a result of his SCC visit. Although the specific cases are not mentioned in the e-mails, they can be inferred based on the contents of the Memorandum found in TF 00074-79, which identifies the cases by name. The communications clearly are work product and fall within RCW 42.17.310(1)(j).

PLAINTIFF'S RESPONSE TO DOCUMENT #7:

Document #7 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #7, and (3) the State may not rely on the work product doctrine.

Additionally, by requesting that the Court make inferences, Appendix A explicitly recognizes that the State lacks the necessary evidence to justify applying the Controversy Exemption to Document #7. A party invoking a privilege bears the burden of proof and, therefore, must include the applicable facts in an affidavit, not merely rely on the face of the documents. *Int'l Paper Co.*, 63 F.R.D. at 94; *Local 851*, 36 F. Supp.2d at 129; *In re Tex E. Transmission*, 1991 WL 87218 at *2; *Delco Wire*, 109 F.R.D. at 688; Rice, *Attorney Client Privilege in the United States*, § 11:10.
See also response to Document #6.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #8**, TF 00081: Controversy Exemption*

This is the same e-mail string as Document #6, TF 00074-75, and requires the same analysis and result.

PLAINTIFF'S RESPONSE TO DOCUMENT #8:

As Document #8 is a duplicate of Document #6, it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #9**, TF 00082: Controversy Exemption/Common Interest*

This document is an e-mail string involving Chief Deputy Attorney General Kathy Mix and various AAGs, beginning with Snohomish County Prosecutor Seth Fine's email to David Hackett, Senior Deputy Prosecuting Attorney for King County, regarding Snohomish County's Motion to Recuse Justice Sanders in Thorell. The subsequent e-mails are comprised of the Ms. Mix's and the AAGs' comments and questions on the motion. The controversy exemption applies to these documents, since the County Prosecuting Attorney Offices and the Attorney General's Office were acting with respect to a matter of common interest. See further analysis in Defendant State of Washington's Motion and Memorandum Seeking Summary Judgment. The controversy is Thorell, and the documents reflect the mental impressions of counsel for the State with regard to the Motion.

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PLAINTIFF'S RESPONSE TO DOCUMENT #9:

Document #9 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof because it failed to present any testimony supporting the elements of the common interest doctrine and the required underlying privilege necessary to invoke the common interest doctrine, (2) the State cannot rely on the "common interest" doctrine since the State has not identified any underlying privilege that would trigger the doctrine, and the "common interest" doctrine alone does not justify the withholding of documents, and (3) the Controversy Exemption does not apply to Document #9. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Court's notes: Sustained. Some parts on §.310(1)(j) grounds alone and other parts on §.310(1)(j) and common interest grounds.

***DOCUMENT #10**, TF 00083-87: Controversy Exemption/Common Interest*

The e-mail string is encompassed within TF 00082, and attaches a draft of the recusal motion that the Snohomish County Prosecutor intended to file. The Court should apply the same reasoning and result as for Document #9.

PLAINTIFF'S RESPONSE TO DOCUMENT #10:

Document #10 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof because it failed to present any testimony supporting the elements of the common interest doctrine and the required underlying privilege necessary to invoke the common interest doctrine, (2) the State cannot rely on the "common interest" doctrine since the State has not identified any underlying privilege that would trigger the doctrine, and the "common interest" doctrine alone does not justify the withholding of documents, and (3) the Controversy Exemption does not apply to Document #10. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, documents are not exempt from disclosure merely because they are drafts. A number of courts have held that there is no expectation of confidentiality in the drafts of documents prepared for disclosure to third parties. *See, e.g., Under Seal (In re Grand Jury Proceedings),* 33. F.3d at 354-55; *Under Seal,* 748 F.2d at 977; Rice, *Attorney-Client Privilege,* 48 Am. U. L. Rev. at 977. A draft document is also not privileged insofar as it is identical to the final version of the document which was submitted to a third party. *Andritz Sprout-Bauer,* 174 F.R.D. at 633; *Gutter* 1998 WL 2017926 at *6; *Boyd,* 88 S.W.3d at 225; *MessagePhone,* 1998 WL 874945.

Court's notes: Sustained on §.310(1)(j) and common interest grounds.

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***DOCUMENT #11**, TF 00088: Controversy Exemption*

This is an e-mail string among AAGs that provides comments on a draft letter to be sent to defense counsel in the SCC detention cases before the Washington Supreme Court. While the e-mails do not expressly identify a "controversy," it can be reasonably inferred that the letter was to be sent to counsel in the Sexual Violent Predator cases (e.g., Thorell) before the Court, which comprise the "controversy" for purposes of the application of RCW 42.17.310(1)(j). A draft of the actual letter is found at TF 380-81. The emails clearly reflect the mental impressions of the State's attorneys.

PLAINTIFF'S RESPONSE TO DOCUMENT #11:

Document #11 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #11. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, by requesting that the Court make inferences, Appendix A explicitly recognizes that the State lacks the necessary evidence to justify applying the Controversy Exemption to Document #11. A party invoking a privilege bears the burden of proof and, therefore, must include the applicable facts in an affidavit, not merely rely on the face of the documents. *Int'l Paper Co.*, 63 F.R.D. at 94; *Local 851*, 36 F. Supp.2d at 129; *In re Tex E. Transmission*, 1991 WL 87218 at *2; *Delco Wire*, 109 F.R.D. at 688; Rice, *Attorney Client Privilege in the United States*, § 11:10.

Even if Document # 11 contains marginalia or other comments that are properly withheld from production, the State may choose to redact those specific portions, but is required to produce the rest of the document. *Amren v. City of Kalama*, 131 Wn. 2d 25, 32, 929 P.2d 389 (1997) (holding that when a document "contains both exempt and non-exempt material, the exempt material may be redacted but the remaining material must be disclosed."); RCW 42.17.310(2).

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #12**, TF 00091: Controversy Exemption*

The redaction on this e-mail between AAGs Timothy Lang and Jeffrey Goltz (copied to other AAGs) recounts a conversation between Mr. Lang and SCC Residential Care Manager Alan McLaughlin regarding occurrences during Justice Sanders's visit to the SCC. It discusses Justice Sanders's conversations with SCC residents in light of issues before the Washington Supreme Court in Thorell (although Thorell is not mentioned by name in the e-mail), and documents received by Justice Sanders from SCC residents (including Ralph Spink, who also had a case pending before the Court in which the State was a party, although his name is not mentioned in the e-mail). The redaction includes Mr. Lang's mental impressions about conversations and events during the SCC visit that involved issues then before the Court. RCW 42.17.310(1)(j) authorizes that redaction.

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PLAINTIFF'S RESPONSE TO DOCUMENT #12:

The redacted portions of Document #12 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #12. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, by requesting that the Court make inferences, Appendix A explicitly recognizes that the State lacks the necessary evidence to justify applying the Controversy Exemption to Document #12. A party invoking a privilege bears the burden of proof and, therefore, must include the applicable facts in an affidavit, not merely rely on the face of the documents. *Int'l Paper Co.*, 63 F.R.D. at 94; *Local 851*, 36 F. Supp.2d at 129; *In re Tex E. Transmission*, 1991 WL 87218 at *2; *Delco Wire*, 109 F.R.D. at 688; Rice, *Attorney Client Privilege in the United States*, § 11:10.

Indeed, the State's claim of controversy here demonstrates that the State is overreaching. The State appears to suggest that any documents relating to Justice Sanders's SCC visit can be encompassed within a controversy (even unidentified cases addressing volitional control and pending before the Washington Supreme Court). While discussions and drafts of motions to recuse arguably fall within the controversy exception, the claim cannot be applied so broadly to encompass everything about Justice Sanders's visit. Based on the State's description, it seems that the entire document is about Justice Sanders's visit and not about strategy or work-product related to recusal in any on-going case and, therefore, the entire document should be produced.

Court's notes: Sustained on §.310(1)(j) grounds. It is not clear why the AGO produced the e-mail transmission information with the body of the email redacted, as it did in this instance, and withheld the entire email from production in other instances. Under the work product doctrine in civil discovery, if the body of the document is protected, the opposing party does not have the right to transmission information as that information is protected as well.

In this record, no part of the redacted portion was improperly redacted.

***DOCUMENT #13**, TF 00092 — 93: Controversy Exemption*

E-mail string forwarding a draft letter written by AAG Tim Lang and revised by Dr. Mark Seling, Superintendent of the SCC, to Washington Supreme Court Chief Justice Alexander, regarding Justice Sanders's tour of SCC, with comments from various AAGs on the revised draft. The revised draft with the AAGs' interlineations is found at TF 00095. The AAGs' comments about the draft reflect the mental impressions of attorneys. The "controversy" consists of then-pending cases in the Washington Supreme Court in which the State was a party and the issue of Justice Sanders's recusal could arise. Although the cases are not mentioned by name, they can be reasonable inferred from other contemporaneous e-mails as the Thorell and Spink cases.
RCW 42.17.310(1)(j) authorizes the withholding of this document.

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PLAINTIFF'S RESPONSE TO DOCUMENT #13:

Document #13 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #13. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, by requesting that the Court make inferences, Appendix A explicitly recognizes that the State lacks the necessary evidence to justify applying the Controversy Exemption to Document #13. A party invoking a privilege bears the burden of proof and, therefore, must include the applicable facts in an affidavit, not merely rely on the face of the documents. *Int'l Paper Co.,* 63 F.R.D. at 94; *Local 851,* 36 F. Supp.2d at 129; *In re Tex E. Transmission,* 1991 WL 87218 at *2; *Delco Wire,* 109 F.R.D. at 688; Rice, *Attorney Client Privilege in the United States,* § 11:10.

See also response to Document #12 regarding the over breadth of the State's notion of controversy. It is simply not enough that a document refer to Justice Sanders's visit to the SCC or contain an AG's mental impression about that visit to invoke controversy/work-product exemption. Moreover, drafting a letter to Chief Justice Alexander in advance of Justice Sanders's visit to the SCC can hardly be treated the same as drafting a motion for recusal based on discussions that allegedly occurred during the visit.

Even if Document #13 contains interlineations or other comments that are properly withheld from production, the State may choose to redact those specific portions, but is required to produce the rest of the document. *Amren v. City of Kalama,* 131 Wn. 2d 25, 32, 929 P.2d 389 (1997) (holding that when a document "contains both exempt and non-exempt material, the exempt material may be redacted but the remaining material must be disclosed."); RCW 42.17.310(2).

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #14**, TF 00094 — 95: Controversy Exemption*

E-mail between AAGs forwarding a revised draft of the letter from Dr. Seling to Justice Alexander concerning Justice Sanders's visit to the SCC, including a copy of the draft letter interlineated by AAGs. The email, letter and interlineations reflect the mental impressions of the AAGs. As is clear from the draft letter, the "controversy" relates to the cases then pending in the Washington Supreme Court to which the State was a party (e.g., Thorell, Spinks) where the litigants could potentially have contacts with Justice Sanders during the upcoming SCC tour.

PLAINTIFF'S RESPONSE TO DOCUMENT #14:

Document #14 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #14. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

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Additionally, by requesting that the Court make inferences, Appendix A explicitly recognizes that the State lacks the necessary evidence to justify applying the Controversy Exemption to Document #14. A party invoking a privilege bears the burden of proof and, therefore, must include the applicable facts in an affidavit, not merely rely on the face of the documents. *Int'l Paper Co.*, 63 F.R.D. at 94; *Local 851*, 36 F. Supp.2d at 129; *In re Tex E. Transmission*, 1991 WL 87218 at *2; *Delco Wire*, 109 F.R.D. at 688; Rice, *Attorney Client Privilege in the United States*, § 11:10.

See also responses to Documents #12 and 13. This document relates to a time period before Justice Sanders's visit to the SCC. Given that time frame and the limited scope of controversy as defined by the Washington Supreme Court, the State cannot sustain its claim.

Even if Document #14 contains interlineations or other comments that are properly withheld from production, the State may choose to redact those specific portions, but is required to produce the rest of the document. *Amren v. City of Kalama*, 131 Wn. 2d 25, 32, 929 P.2d 389 (1997) (holding that when a document "contains both exempt and non-exempt material, the exempt material may be redacted but the remaining material must be disclosed."); RCW 42.17.310(2).

Additionally, documents are not exempt from disclosure merely because they are drafts. A number of courts have held that there is no expectation of confidentiality in the drafts of documents prepared for disclosure to third parties. *See, e.g., Under Seal (In re Grand Jury Proceedings)*, 33. F.3d at 354-55; *Under Seal*, 748 F.2d at 977; Rice, *Attorney-Client Privilege*, 48 Am. U. L. Rev. at 977. A draft document is also not privileged insofar as it is identical to the final version of the document which was submitted to a third party. *Andritz Sprout-Bauer*, 174 F.R.D. at 633; *Gutter* 1998 WL 2017926 at *6; *Boyd*, 88 S.W.3d at 225; *MessagePhone*, 1998 WL 874945.

Court's notes: Sustained on §.310(1)(j) grounds. Although the document was generated before Justice Sander's visit to SCC, the litigation involving Thorell and Spinks was ongoing at the time. Further, as discussed in my opinion, the time for assessment of the controversy in §.310(1)(j) is the time of production, not the time when the record was created.

***DOCUMENT #15**, TF 00096 — 97: Controversy Exemption*

This e-mail string is encompassed within Document #13, TF 00092-93, and requires the same analysis and result.

PLAINTIFF'S RESPONSE TO DOCUMENT #15:

As Document #15 is encompassed within Document #13, it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #16**, TF 00113: Controversy Exemption*

This redacted e-mail string is encompassed within Document #12, TF 00091, and requires the same analysis of the redaction, and result.

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PLAINTIFF'S RESPONSE TO DOCUMENT #16:

As Document #16 is encompassed within Document #12, the redactions were wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #17**, TF 00114: Attorney-Client Privilege; Controversy Exemption*

This document consists of an e-mail string between AAG Timothy Lang and Deputy Attorney General Jeffrey Goltz, and Senior AAG's Bill Williams and Lucy Isaki, with a redaction of a two-sentence paragraph regarding a request by DSHS Secretary Dennis Braddock to the Attorney-General's Office regarding Justice Sanders's upcoming tour of the SCC. The redaction is of a confidential communication between a client (DSHS) and its attorneys, which is exempted from disclosure by RCW 42.17.260(1) and RCW 5.60.060(2). The redaction also is subject to the controversy exemption with respect to then-pending cases in the Washington Supreme Court in which the issue of Justice Sanders's recusal could arise.

PLAINTIFF'S RESPONSE TO DOCUMENT #17:

The redacted portions of Document #17 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #17, and (3) the State may not rely on the attorney-client privilege.

See also responses to Documents #12 through #16, as to the overbreadth of the State's claim of controversy and the inappropriateness of asserting it to the time period BEFORE justice Sanders's visit to the SCC. The State's description is also telling in that it does not specify that the purpose of the communication between DSHS and the AGs was to seek and/or give legal advice. Absent that purpose, the communication is not privileged.

Court's notes: Sustained on §.310(1)(j) and RCW 5.60.060(2)(a) grounds.

***DOCUMENT #18**, TF 00122 — 125: Controversy Exemption*

This documents consists of a memorandum from AAG Todd Bowers to Attorney General Christine Gregoire and Chief Deputy Attorney General Kathy Mix, concerning Justice Sanders's visit to the SCC. The memorandum is also found within Document #6 at TF 00076-79, and is subject to the same analysis under the controversy exemption.

PLAINTIFF'S RESPONSE TO DOCUMENT #18:

As Document #18 is found within Document #6, it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #19**, TF 00133 — 135: Controversy Exemption*

This item is an e-mail from Senior AAG Bill Williams to Chief Deputy Attorney General Kathy Mix and other AAGs attaching and making suggestions regarding a draft

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letter to be sent to (unidentified) defense counsel in SCC detention cases before the Washington Supreme Court. The e-mail and draft letter are exempt from disclosure under RCW 42.17.310(1)(j), since they involve "controversies," i.e., the matters pending before the Court to which the State was a party, and reflect the mental impressions and analysis of counsel with respect to those controversies.

PLAINTIFF'S RESPONSE TO DOCUMENT #19:

Document #19 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #19. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, documents are not exempt from disclosure merely because they are drafts. A number of courts have held that there is no expectation of confidentiality in the drafts of documents prepared for disclosure to third parties. *See, e.g., Under Seal (In re Grand Jury Proceedings),* 33. F.3d at 354-55; *Under Seal,* 748 F.2d at 977; Rice, *Attorney-Client Privilege,* 48 Am. U. L. Rev. at 977. A draft document is also not privileged insofar as it is identical to the final version of the document which was submitted to a third party. *Andritz Sprout-Bauer,* 174 F.R.D. at 633; *Gutter* 1998 WL 2017926 at *6; *Boyd,* 88 S.W.3d at 225; *MessagePhone,* 1998 WL 874945.

Court's notes: Sustained on §.310(1)(j) grounds. Further, Justice Sander's argument that the AGO's claim of exemption fails to "identify any applicable privilege to satisfy the second prong of the Controversy Exemption" is not persuasive. §.310(1)(j) invokes the protection of the work product doctrine. If *in camera* examination reveals work product, that is sufficient to satisfy the exemption; a separate privilege is not necessary.

***DOCUMENT #20, TF 00177**: Not Responsive/Controversy Exemption*

The first redaction from this email between AAG Timothy Lang and AAGs Pamela Anderson and Allison Stanhope relates to a decision by Division 1 of the Court of Appeals on a motion to modify a denial of discretionary review, and constitutes work product (implicating the controversy exemption) with respect to that case. That paragraph also is not responsive to Justice Sanders's PDA request, as it involves matters distinct from the topics in his request.

The other redaction, in the email from AAG Pamela Anderson to AAG Timothy Lang, addresses in general the weekly report, and is non-responsive.

PLAINTIFF'S RESPONSE TO DOCUMENT #20:

The redacted portions of Document #20 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #20, and (3) the State may not rely on the work product doctrine.

Additionally, Justice Sanders cannot comment on whether Document #20 is non-responsive. It is suspicious that it was not produced and placed on the State's exemption log if it is indeed as non-responsive as described.

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Court's notes: Sustained. The redacted paragraph is not related to Justice Sanders' PDA request, and may be redacted for that reason. Interestingly the paragraph discusses other litigation involving the state and is work product, so that protection would also apply.

***DOCUMENT #21**, TF 00187: Controversy Exemption*

This redacted e-mail string is a duplicate of that found at Document #17, TF 00114, and requires the same analysis and result.

PLAINTIFF'S RESPONSE TO DOCUMENT #21:

As Document #21 is a duplicate of Document #17, it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) and RCW 5.60.060(2)(a) grounds.

***DOCUMENT #22**, TF 00188 — 191: Attorney-Client Privilege*

The redacted portions of this e-mail string reflect a confidential attorney-client communication between Senior AAG Lucy Isaki and DSHS official Bernie H. Friedman, Special Assistant to the Secretary for Loss Prevention and Risk Management, with regard to Justice Sanders's SCC tour. The privilege applies because DSHS is the client of Senior AAG Lucy Isaki, and the communications relate to confidential advice provided by the attorney regarding the conduct of the DSHS official.

PLAINTIFF'S RESPONSE TO DOCUMENT #22:

The redacted portions of Document #22 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof that the attorney-client privilege applies to Document #22, and (2) the State waived its right to assert the attorney-client privilege regarding Document #22.

In addition, the attorney-client privilege can only be invoked and waived by the client. Here, Mr. Friedman has submitted an affidavit stating that the attorney-client privilege is not being invoked with respect to his communications with the Attorney General's office regarding Justice Sanders's visit to the SCC. *See* Declaration of Bernhard H. Friedman (11/28/05).

Court's notes: Sustained on RCW 5.60.060(2)(a) grounds. These emails, while a bit chatty, clearly seek and then discuss the advisability of actions from a legal perspective. Mr. Friedman cannot unilaterally waive his employer-agency's privilege.

***DOCUMENT #23**, TF 00198: Controversy Exemption*

This e-mail string is encompassed within Document #12, TF 00091, and requires the same analysis and result.

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PLAINTIFF'S RESPONSE TO DOCUMENT #23:

As Document #23 is encompassed within Document #12, it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #24**, TF 00208: Attorney-Client Privilege/Not Responsive*

This is an e-mail string involving Diane Campbell, Legal Assistant to Senior AAG Lucy Isaki, as well as Senior AAGs Lucy Isaki and Bill Williams, and AAG Timothy Lang, regarding "SCC Legislature Memo." The memo is not attached. The last e-mail contains a single line regarding an attorney-client communication between Timothy Lang and Alan McLaughlin about Justice Sanders's visit to the SCC. This line is privileged since it is a confidential attorney-client communication. The rest of the e-mail is not responsive to Justice Sanders's PDA request.

PLAINTIFF'S RESPONSE TO DOCUMENT #24:

Document #24 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof that the attorney-client privilege applies to Document #24, and (2) the State waived its right to assert the attorney-client privilege regarding Document #24.

Additionally, Justice Sanders cannot independently determine and therefore does not concede that Document #24 is non-responsive. Moreover, the State's description does not indicate that purpose of the communication was to give legal advice.

Court's notes: The exemption for the line relating to Justice Sanders is sustained on §.310(1)(j) grounds. The rest of the email string does not relate to Justice Sanders' PDA request, so redaction of that material is sustained for that reason.

***DOCUMENT #25**, TF 00209 – 211: Attorney-Client Privilege; Controversy Exemption*

The redacted portion of this e-mail, from DSHS SCC Legal Coordinator Becky Denny to AAG Timothy Lang, relates to a draft declaration by Alan McLaughlin in Thorell addressing Justice Sanders's visit to the SCC. The redacted portion reflects a confidential request for legal advice from a client (DSHS) to its attorney, and thus the attorney-client privilege applies. The "controversy" exemption also applies, since the draft declaration was to be filed in the Thorell case to which the State was a party.

PLAINTIFF'S RESPONSE TO DOCUMENT #25:

The redacted portions of Document #25 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #25, and (3) the State may not rely on the attorney-client privilege.

Court's notes: Sustained on either §.310(1)(j) or RCW 5.60.060(2)(a) grounds.

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***DOCUMENT #26**, TF 00212: Attorney-Client Privilege; Controversy Exemption*

This document contains the same e-mail exchange as Document #25 at TF 00209, and includes a subsequent e-mail from AAG Timothy Lang to Becky Denny conveying legal advice regarding the McLaughlin declaration. It requires the same analysis and result as Document #25.

PLAINTIFF'S RESPONSE TO DOCUMENT #26:

Document #26 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #26, and (3) the State may not rely on the attorney-client privilege.

Court's notes: Sustained on either §.310(1)(j) or RCW 5.60.060(2)(a) grounds.

***DOCUMENT #27**, TF 00214: Attorney-Client Privilege; Controversy Exemption*

This document is an e-mail string beginning with a message from Snohomish County Prosecutor Seth Fine to DSHS' Alan McLaughlin regarding "Affidavit on Sanders Visit." The string also includes Mr. McLaughlin's response to Mr. Fine (copied to AAG Timothy Lang), and a final email from Mr. Lang to Senior AAG Lucy Isaki. Only the most recent email, from Mr. Lang to Ms. Isaki, is redacted. The redaction is proper under the attorney-client privilege and controversy exemption because it relates the attorney's response to the confidential request of the DSHS client (see redaction from Document #25, TG 00209) and relates to the Thorell "controversy."

PLAINTIFF'S RESPONSE TO DOCUMENT #27:

The redacted portions of Document #27 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #27, and (3) the State may not rely on the attorney-client privilege.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #28**, TF 00220: Controversy Exemption*

This email string relates to the AG's letter to counsel in pending Sexually Violent Predator ("SVP") cases regarding Justice Sanders's tour of the SCC. The redacted portions, i.e., emails involving Deputy AG Jeffrey Goltz, AAG Brian Moran, Solicitor General Narda Pierce, Senior AAG Bill Williams, AAG Pamela Anderson, AAG Timothy Lang, and Chief Deputy Attorney General Kathy Mix, reflect the attorneys' mental impressions regarding the letter and an attachment to the letter. While the e-mails do not expressly identify a "controversy," it can be reasonably inferred that the letter was to be sent to counsel in the SVP cases before the Court to which the State was a party (see Document #19, TF 134-135 for a draft of the letter) which comprise the "controversy" for purposes of application of RCW 42.17.310(1)(j).

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PLAINTIFF'S RESPONSE TO DOCUMENT #28:

The redacted portions of Document #28 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #28. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, by requesting that the Court make inferences, Appendix A explicitly recognizes that the State lacks the necessary evidence to justify applying the Controversy Exemption to Document #28. A party invoking a privilege bears the burden of proof and, therefore, must include the applicable facts in an affidavit, not merely rely on the face of the documents. *Int'l Paper Co.*, 63 F.R.D. at 94; *Local 851*, 36 F. Supp.2d at 129; *In re Tex E. Transmission*, 1991 WL 87218 at *2; *Delco Wire*, 109 F.R.D. at 688; Rice, *Attorney Client Privilege in the United States*, § 11:10.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #29**, TF 00221 – 223: Controversy Exemption*

The first email in this string, from Deputy Attorney General Jeffrey Goltz to AAG Brian Moran, Solicitor General Narda Pierce, and Senior AAG Bill Williams, copied to AAGs Pamela Anderson and Timothy Lang and Chief Deputy Attorney General Kathy Mix, is identical to the first e-mail in Document #28, TF 00220, and should be handled the same. The other emails, involving the same individuals plus Cynthia Lockridge (Legal Assistant), also reflect attorneys' impressions on the letter referenced in Document #28, and also fall within the "controversy" exemption of RCW 42.17.310(1)(j).

PLAINTIFF'S RESPONSE TO DOCUMENT #29:

The redacted portions of Document #29 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #29. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, by requesting that the Court make inferences, Appendix A explicitly recognizes that the State lacks the necessary evidence to justify applying the Controversy Exemption to Document #29. A party invoking a privilege bears the burden of proof and, therefore, must include the applicable facts in an affidavit, not merely rely on the face of the documents. *Int'l Paper Co.*, 63 F.R.D. at 94; *Local 851*, 36 F. Supp.2d at 129; *In re Tex E. Transmission*, 1991 WL 87218 at *2; *Delco Wire*, 109 F.R.D. at 688; Rice, *Attorney Client Privilege in the United States*, § 11:10.

Court's notes: Sustained on §.310(1)(j) grounds.

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***DOCUMENT #30**, TF 00269 – 270: Controversy Exemption*

This document is a memorandum from AAG Todd Bowers to Senior AAG Lucy Isaki, copied to other AAGs, regarding the procedure followed in processing Justice Sanders's request for documents, and containing legal analysis regarding the grounds for withholding documents in response to a subpoena or PDA request. The memorandum reflects the thought processes of an attorney and is protected as "work product" under RCW 42.17.310(1)(j). The "controversies" are the existing dispute with Justice Sanders about payment of his defense costs in the CJC matter, and the reasonably anticipated dispute between Justice Sanders and the Attorney General's Office over document production.

PLAINTIFF'S RESPONSE TO DOCUMENT #30:

Document #30 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #30, and (3) the State may not rely on the work product doctrine.

Remarkably, the State claims that Document #30 relates to a "controversy" with Justice Sanders over document production. The State apparently contends that its general anticipation that Justice Sanders might seek documents from it at some time is a legally sufficient "controversy" under RCW 42.17.310(j). Moreover, while the Original Exemption Log dates Document #30 to "00/00/2003," Justice Sanders did not file his PDA request until June 2004. *See* Lawrence Decl. (November 28, 2005), Ex. C at 10. There cannot be a "controversy" regarding Justice Sanders's request before he has even made it. The State has failed to prove that Document #30 relates to a "controversy," as defined in *Hangartner*, 151 Wn.2d at 450.

Finally, the process by which the State (or any agency) responds to a PDA request cannot be considered exempt from disclosure. Indeed, the process by which an agency responded to a PDA request is at the heart of the issue in any PDA litigation because it is relevant to the amount of the statutory penalty. This document appears to be about the process for responding to a possible PDA request by Justice Sanders and should be produced.

Court's notes: Exemption denied. In my written opinion I identified three examples of litigation that satisfy the first requirement of §.310(1)(j). The record here does not pertain to any of those litigations. The litigation anticipated here, a possible dispute over public records production, has not previously been mentioned in any material submitted by the AGO. The record does not contain evidence that would permit the court to conclude that it was reasonably anticipated.

***DOCUMENT #31**, TF 00301 — 304: Controversy Exemption/Common Interest*

This redacted document is an e-mail string involving AAGs Todd Bowers, Scott Blonien, Brian Moran, Sarah Sappington, Senior AAG Lucy Isaki, Linda Fredericks, Executive Assistant to Attorney General Christine Gregoire, and Chief Deputy Attorney General Kathy Mix, addressing a memorandum discussing Justice Sanders's SCC visit, procedure for recusal of a Supreme Court Justice, and conversations with King County Prosecutor's Office attorneys regarding potential consequences of the SCC visit. A

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substantial portion of TF 00301-302 is identical to the document at Document #7, TF 00080 and the analysis should be the same. The other redacted emails reflect the mental impressions of the attorneys with respect to the effect on Justice Sanders's SCC visit on pending cases to which the State was a party, in which recusal could possibly be required. The communications clearly are work product and fall within RCW 42.17.310(1)(j).

PLAINTIFF'S RESPONSE TO DOCUMENT #31:

The redacted portions of Document #31 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the State cannot rely on the "common interest" doctrine, and (3) the State may not rely on the work product doctrine.

Moreover, to the extent that the memorandum addresses issues unrelated to consideration of a recusal motion in a pending case, the State has not identified a controversy that would justify an exemption from disclosure and production. For example, to the extent that the memorandum addresses factual descriptions of Justice Sanders's visits, the Attorney General's decisions regarding participation in the visit, instructions to SCC personnel about how to proceed during Justice Sanders visit, or like issues unrelated to legal advice or work product regarding the specific issue of recusal, the memorandum should be produced in redacted form.

Court's notes: Sustained on §.310(1)(j) and common interest grounds.

***DOCUMENT #32**, TF 00332 — 338: Controversy Exemption/Common Interest*

This document is an email string forwarding a draft letter (which is attached) from Mark Larson, Brian Moran, and "Snohomish Cy." to the Executive Director of the SJC with regard to Justice Sanders's SCC visit and potential ethical violations. The letter and the redaction from the email string at TF 00332 contain the mental impressions of AAG Brian Moran conveyed to attorneys in the offices of the King County Prosecutor and Snohomish County Prosecutor regarding the letter. As described in the State's memorandum, the County Prosecuting Attorney Offices and the Attorney General's Office were acting together for the State on a matter of common interest. The controversy at issue is the various sexually violent predator cases pending before the Washington Supreme Court to which the State was a party.

PLAINTIFF'S RESPONSE TO DOCUMENT #32:

Document #32, and the redacted portions thereof, were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the State cannot rely on the "common interest" doctrine, and (3) the Controversy Exemption does not apply to Document #32. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, documents are not exempt from disclosure merely because they are drafts. A number of courts have held that there is no expectation of confidentiality in the drafts of documents prepared for disclosure to third parties. *See, e.g., Under Seal (In re*

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Grand Jury Proceedings), 33. F.3d at 354-55; *Under Seal,* 748 F.2d at 977; Rice, *Attorney-Client Privilege,* 48 Am. U. L. Rev. at 977. A draft document is also not privileged insofar as it is identical to the final version of the document which was submitted to a third party. *Andritz Sprout-Bauer,* 174 F.R.D. at 633; *Gutter* 1998 WL 2017926 at *6; *Boyd,* 88 S.W.3d at 225; *MessagePhone,* 1998 WL 874945.

Moreover, a document addressing possible "ethical violations" on its face seems relevant to whether the parties to the communications were considering filing a complaint with the Commission on Judicial Conduct rather than considering a recusal motion in a pending case. To the extent that the memorandum addresses issues unrelated to consideration of a recusal motion in a pending case, the State has not identified a controversy that would justify an exemption from disclosure and production. Thus, for example, to the extent that the memorandum addresses factual descriptions of Justice Sanders's visits, the Attorney General's decisions regarding participation in the visit, instructions to SCC personnel about how to proceed during Justice Sanders visit, or like issues unrelated to legal advice or work product regarding the specific issue of recusal, the memorandum should be produced in redacted form.

Court's notes: Exemption denied. This work product does not pertain to the litigation identified in my written opinion. Common interest applies only where it is linked to an identifiable exemption.

***DOCUMENT #33**, TF 00339 — 343: Controversy Exemption/Common Interest*

This document is an e-mail string in which AAG Brian Moran forwarded, to other AAGs and Chief Deputy Attorney General Kathy Mix, an e-mail from Snohomish County Prosecutor Seth Fine to King County Senior Deputy Prosecuting Attorney David Hackett, attaching a copy of a draft motion to recuse Justice Sanders in Thorell. The same analysis and result is required as for Document #32.

PLAINTIFF'S RESPONSE TO DOCUMENT #33:

Document #33 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof because it failed to present any testimony supporting the elements of the common interest doctrine and the required underlying privilege necessary to invoke the common interest doctrine, (2) the State cannot rely on the "common interest" doctrine since the State has not identified any underlying privilege that would trigger the doctrine, and the "common interest" doctrine alone does not justify the withholding of documents, and (3) the Controversy Exemption does not apply to Document #33. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Court's notes: Sustained on §.310(1)(j) and common interest grounds.

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***DOCUMENT #34**, TF 00363 — 366: Controversy Exemption*

The memorandum withheld from disclosure is the same as the memorandum in Document #6, IT 00076-79, except with a different date. The analysis and result should be the same under RCW 42.17.310(1)(j).

PLAINTIFF'S RESPONSE TO DOCUMENT #34:

As Document #34 is a duplicate of Document #6, only with a different date, it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #35**, TF 00371: Controversy Exemption/Common Interest*

This is an e-mail from AAG Brian Moran to Senior AAG Bill Williams, describing a conversation with a King County Prosecuting Attorney about a proposed letter with respect to the issues involving Justice Sanders. The e-mail reflects the mental impressions of counsel with respect to cases pending in the Washington Supreme Court in which the State was a party. Although no cases are expressly mentioned in the e-mail, it can be reasonably inferred from contemporaneous documents (see, e.g., Document #19, TF 00133-35) that the letter related to cases brought by SCC residents that were pending in the Washington Supreme Court. The analysis and the result should be the same as for Document #19.

PLAINTIFF'S RESPONSE TO DOCUMENT #35:

Document #35 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof because it failed to present any testimony supporting the elements of the common interest doctrine and the required underlying privilege necessary to invoke the common interest doctrine, (2) the State cannot rely on the "common interest" doctrine since the State has not identified any underlying privilege that would trigger the doctrine, and the "common interest" doctrine alone does not justify the withholding of documents, and (3) the Controversy Exemption does not apply to Document #35. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, by requesting that the Court make inferences, Appendix A explicitly recognizes that the State lacks the necessary evidence to justify applying the Controversy Exemption to Document #35. A party invoking a privilege bears the burden of proof and, therefore, must include the applicable facts in an affidavit, not merely rely on the face of the documents. *Int'l Paper Co.*, 63 F.R.D. at 94; *Local 851*, 36 F. Supp.2d at 129; *In re Tex E. Transmission*, 1991 WL 87218 at *2; *Delco Wire*, 109 F.R.D. at 688; Rice, *Attorney Client Privilege in the United States*, § 11:10.

Court's notes: Sustained on §.310(1)(j) grounds.

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***DOCUMENT #36**, TF 00378: Controversy Exemption*

The redaction in this e-mail string is an email from AAG Todd Bowers to AAG Brian Moran containing the former's mental impressions regarding the Spink case that was then pending before the Washington Supreme Court, and Justice Sanders's involvement in Spink. The redaction is appropriate under RCW 42.17.310(1)(j).

PLAINTIFF'S RESPONSE TO DOCUMENT #36:

The redacted portions of Document #36 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #36. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #37**, TF 00379 – 381: Controversy Exemption*

This document consists of a short email string and an interlineated draft letter from AAG Brian Moran to be sent to defense counsel in cases pending before the Washington Supreme Court involving parties with whom Justice Sanders had interactions during his SCC tour. The first email is also redacted on Document # 28, TF 00220, and should be withheld for the same reasons. The second email also contains the mental impressions of counsel respect to the same "controversies" and should be withheld for the same reasons. The interlineated draft letter is work product with respect to pending cases before the Court, to which RCW 42.17.310(1)(j) applies.

PLAINTIFF'S RESPONSE TO DOCUMENT #37:

Document #37 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #37, and (3) the State may not rely on the work product doctrine.

Additionally, even if Document #37 contains interlineations or other comments that are properly withheld from production, the State may choose to redact those specific portions, but is required to produce the rest of the document. The Washington Supreme Court had held that if a document "contains both exempt and non-exempt material, the exempt material may be redacted but the remaining material must be disclosed." *Amren v. City of Kalama,* 131 Wn. 2d 25, 32, 929 P.2d 389 (1997), *citing* RCW 42.17.310(2).

See also response to Document #28.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #38**, TF 00382: Controversy Exemption*

This e-mail string is identical to identical to Document #28, TF 00220, and requires the same analysis and result.

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PLAINTIFF'S RESPONSE TO DOCUMENT #38:

In that Document #38 is identical to Document #28, then it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #39**, TF 00383 – 388: Controversy Exemption*

This document has been entirely redacted except for the three mails on top of TF 00386. The bottom two emails on TF 00383 (duplicated at the bottom of TF 00384, at 00385, at 00386-387, and also on the bottom of TF 00388) are also found at Document #29, TF 00221, and are exempted from production for the same reasons. The top email on TF 00384 is also found at Document #29, TF 00223, and is exempted from production for the same reason. The two e-mails at the top of TF 383 involving Deputy Attorney General Jeffrey Goltz, AAG Brian Moran, and Cynthia Lockridge, Legal Assistant, and the two emails on the top of TF 385 and two e-mails in the middle of TF 386 (the Goltz email of April 3, 1:57 PM and the Moran response at 2:12 PM), all involving the same parties, are subject to RCW 42.17.310(1)(j), as they contain the mental impressions of counsel relating to the letter at Document #37, TF 380-81, which addresses the controversies in cases pending before the Washington Supreme Court to which the State was a party.

PLAINTIFF'S RESPONSE TO DOCUMENT #39:

The redacted portions of Document #39 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #39. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, by requesting that the Court make inferences, Appendix A explicitly recognizes that the State lacks the necessary evidence to justify applying the Controversy Exemption to Document #39. A party invoking a privilege bears the burden of proof and, therefore, must include the applicable facts in an affidavit, not merely rely on the face of the documents. *Int'l Paper Co.*, 63 F.R.D. at 94; *Local 851*, 36 F. Supp.2d at 129; *In re Tex E. Transmission*, 1991 WL 87218 at *2; *Delco Wire*, 109 F.R.D. at 688; Rice, *Attorney Client Privilege in the United States*, § 11:10.

See also responses to Documents #s 29 and 37.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #40**, TF 00389 – 391: Controversy Exemption*

This document is an e-mail from Solicitor General Narda Pierce to Senior AAG Scott Blonien, AAGs Brian Moran, Sarah Sappington, Todd Bowers, and Chief Deputy Attorney General Kathy Mix, addressing an attached draft letter to be sent to C.J. Merritt, Supreme Court Clerk, in response to his letter to counsel in In re the Detention of Bernard Thorell. The emails and draft are subject to RCW 42.17.310(1)(j) for the

same reasons as the e-mails and different draft of the letter found at Documents #4 and #5.

PLAINTIFF'S RESPONSE TO DOCUMENT #40:

Document #40 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #40, and (3) the State may not rely on the work product doctrine.

Additionally, documents are not exempt from disclosure merely because they are drafts. A number of courts have held that there is no expectation of confidentiality in the drafts of documents prepared for disclosure to third parties. *See, e.g., Under Seal (In re Grand Jury Proceedings),* 33. F.3d at 354-55; *Under Seal,* 748 F.2d at 977; Rice, *Attorney-Client Privilege,* 48 Am. U. L. Rev. at 977. A draft document is also not privileged insofar as it is identical to the final version of the document which was submitted to a third party. *Andritz Sprout-Bauer,* 174 F.R.D. at 633; *Gutter* 1998 WL 2017926 at *6; *Boyd,* 88 S.W.3d at 225; *MessagePhone,* 1998 WL 874945.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #41**, TF 00392: Controversy Exemption*

This e-mail from AAG Todd Bowers to AAG Brian Moran, copied to AAG Sarah Sappington, also discusses the draft letter response to the Clerk of the Supreme Court discussed with respect to Documents #4, #5, and #40, and is subject to the "controversy" exemption of RCW 42.17.310(1)(j) for the same reasons.

PLAINTIFF'S RESPONSE TO DOCUMENT #41:

Document #41 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #41, and (3) the State may not rely on the work product doctrine.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #42**, TF 00393 – 394: Controversy Exemption/Common Interest*

This document consists of an email from AAG Brian Moran to AAG Todd Bowers regarding review, by the Senior Deputy Prosecuting Attorney for King County, of an attached draft letter to counsel for one of the SCC residents, Anthony Jacka. The email and draft letter reflect the mental impressions of counsel with respect to a pending controversy to which the State was a party, i.e., Mr. Jacka's case, and thus are subject to RCW 42.17.310(j)(1).

PLAINTIFF'S RESPONSE TO DOCUMENT #42:

Document #42 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof because it failed to present any testimony supporting the elements of the common interest doctrine and the required underlying privilege necessary to invoke the common interest

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doctrine, (2) the State cannot rely on the "common interest" doctrine since the State has not identified any underlying privilege that would trigger the doctrine, and the "common interest" doctrine alone does not justify the withholding of documents, and (3) the Controversy Exemption does not apply to Document #42. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, the draft letter is not exempt from disclosure merely because it is a draft, as argued in Plaintiff's Response to Document #5.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #43**, TF 00395 – 398: Controversy Exemption*

This document is an e-mail string involving Solicitor General Narda Pierce, Senior AAG Scott Blonien, AAGs Brian Moran, Sarah Sappington, Todd Bowers, and Chief Deputy Attorney General Kathy Mix; regarding another draft of the letter to Supreme Court Clerk C.J. Merritt, which is attached (see also Documents #5 and #40 for other drafts). The first (earliest in date/time) e-mail is identical to TF 389 in Document #40, and the analysis and result should be the same. The remaining two e-mails reflect the attorneys' evaluation and impressions with respect to the draft letter and cases pending before the Washington Supreme Court to which the State was a party. RCW 42.17.310(j)(1) applies to the entire document including the draft, as discussed with respect to Documents #5 and #40.

PLAINTIFF'S RESPONSE TO DOCUMENT #43:

Document #43 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #43, and (3) the State may not rely on the work product doctrine. Additionally, the draft letter is not exempt from disclosure merely because it is a draft, as argued in Plaintiff's Response to Document #5.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #44**, TF 00399 – 401: Controversy Exemption*

This is an e-mail string identical to that at Document #43 (TF 00395-396), but including an additional e-mail from AAG Todd Bowers to AAGs Brian Moran and Sarah Sappington, and omitting a copy of the draft letter. The new e-mail discusses the possible need for Justice Sanders's recusal from cases pending before the Washington Supreme Court as a result of his SCC visit. The controversy exemption applies to this document for the same reasons as Document #42.

PLAINTIFF'S RESPONSE TO DOCUMENT #44:

Document #44 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the State cannot rely on the "common interest" doctrine, and (3) the Controversy Exemption does not apply to Document #44. Specifically, the State fails to even assert

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that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #45**, TF 00402 – 403: Controversy Exemption*

This is an e-mail string identical to that at Document #43 (TF 00395-396), but including an additional e-mail from AAG Brian Moran to Solicitor General Narda Pierce, which comments on a draft letter to the clerk of the Washington Supreme Court, C.J. Merritt. The controversy exemption applies to this document for the same reasons as Document #42.

PLAINTIFF'S RESPONSE TO DOCUMENT #45:

Document #45 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the State cannot rely on the "common interest" doctrine, and (3) the Controversy Exemption does not apply to Document #45. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #46**, TF 00404: Controversy Exemption*

This is an e-mail from AAG Brian Moran to AAG Todd Bowers containing the former's mental impressions with respect to the draft letter responding to C.J. Merritt's letter, and the AAGs assigned to SCC cases pending in the Washington Supreme Court to which the State was a party, including Spink and Thorell. The controversy exemption applies.

PLAINTIFF'S RESPONSE TO DOCUMENT #46:

Document #46 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #46. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #47**, TF 00405 – 413: Controversy Exemption*

This redacted document is an e-mail string containing the e-mails found in Document #43 (TF 00395-396), but including two copies of an additional e-mail from AAG Brian Moran to Senior AAG Scott Blonien, and a brief two e-mail exchange between Mr. Moran and Solicitor General Narda Pierce, regarding signatures on the

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C.J. Merritt letter. The controversy exemption applies for the reasons stated with respect to Document #43.

PLAINTIFF'S RESPONSE TO DOCUMENT #47:

The redacted portions of Document #47 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #47. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #48**, TF 00415 – 16: Controversy Exemption*

This is another interlineated version of a draft letter to be sent by the Attorney General's Office to C.J. Merritt, Supreme Court Clerk, in response to his letter to counsel in In re the Detention of Bernard Thorell. Other drafts are found at Documents #5, #40, and #43. The draft is subject to RCW 42.17.310(1)(j) for the same reasons as the different drafts of the letter found at Documents #5, #40, and #43.

PLAINTIFF'S RESPONSE TO DOCUMENT #48:

Document #48 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #48, and (3) the State may not rely on the work product doctrine.

Additionally, the draft letter is not exempt from disclosure merely because it is a draft, as argued in Plaintiff's Response to Document #5.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #49**, TF 00417 – 419: Controversy Exemption*

This document is the same interlineated draft letter as Document #48, with an attached e-mail exchange between AAG Sarah Sappington and AAG Brian Morgan reflecting the mental impressions of counsel with respect to the draft letter. The document is subject to RCW 42.17.410(1)(j) for the reasons stated with respect to Documents #4, #5, #40, and #48.

PLAINTIFF'S RESPONSE TO DOCUMENT #49:

Document #49 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #49, and (3) the State may not rely on the work product doctrine.

Additionally, the draft letter is not exempt from disclosure merely because it is a draft, as argued in Plaintiff's Response to Document #5.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #50**, TF 00420: Controversy Exemption*

This e-mail between AAG Sarah Sappington and Cynthia Lockridge, Legal Assistant, copied to AAG Brian Moran, comments on a draft of the letter to C.J. Merritt. Because the comment reflects the AAG's mental impressions with respect to the letter relating to the Thorell case pending before the Washington Supreme Court to which the State was a party, it is subject to the controversy exemption.

PLAINTIFF'S RESPONSE TO DOCUMENT #50:

Document #50 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #50. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #51**, TF 00422 – 423: Controversy Exemption*

This is another version of a draft letter to be sent by the Attorney General's Office to C.J. Merritt, Supreme Court Clerk, in response to his letter to counsel in Thorell and Spink. Other drafts are found at Documents #5, #40, and 48. The draft is subject to RCW 42.17.310(1)(j) for the same reasons as the drafts of the letter found at Documents #5, #40, and #48.

PLAINTIFF'S RESPONSE TO DOCUMENT #51:

Document #451was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #51, and (3) the State may not rely on the work product doctrine.

Additionally, the draft letter is not exempt from disclosure merely because it is a draft, as argued in Plaintiff's Response to Document #5.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #52**, TF 00424 – 427: Controversy Exemption*

This redacted document is an e-mail string (including duplicates) involving AAGs Sarah Sappington, Brian Moran, Todd Bowers and Solicitor General Narda Pierce, commenting on a draft of the letter to C.J. Merritt regarding Justice Sanders's SCC visit and possible recusal in Thorell and Spink. It also includes the same draft letter to Mr. Merritt found at Document #48. The e-mails and drafts are subject to RCW 42.17.410(1)(j) for the reasons stated with respect to Documents #4, #5, #40, #48, and #51.

PLAINTIFF'S RESPONSE TO DOCUMENT #52:

The redacted portions of Document #52 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to

meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #52, and (3) the State may not rely on the work product doctrine.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #53**, TF 00432: Controversy Exemption/Common Interest*

This document is an email from AAG to Sarah Sappington to David Hackett, Senior Deputy Prosecuting Attorney for King County, with respect to a communication regarding "Sanders." The e-mail reflects the mental impressions of an attorney, and is subject to the controversy exemption. Although no particular case is mentioned, it can be reasonably inferred from the time period and subject that the e-mail relates to the letter to C.J. Merritt with respect to Thorell and Spink.

PLAINTIFF'S RESPONSE TO DOCUMENT #53:

Document #53 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof because it failed to present any testimony supporting the elements of the common interest doctrine and the required underlying privilege necessary to invoke the common interest doctrine, (2) the State cannot rely on the "common interest" doctrine since the State has not identified any underlying privilege that would trigger the doctrine, and the "common interest" doctrine alone does not justify the withholding of documents, and (3) the Controversy Exemption does not apply to Document #53. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, by requesting that the Court make inferences, Appendix A explicitly recognizes that the State lacks the necessary evidence to justify applying the Controversy Exemption to Document #53. A party invoking a privilege bears the burden of proof and, therefore, must include the applicable facts in an affidavit, not merely rely on the face of the documents. *Int'l Paper Co.*, 63 F.R.D. at 94; *Local 851*, 36 F. Supp.2d at 129; *In re Tex E. Transmission*, 1991 WL 87218 at *2; *Delco Wire*, 109 F.R.D. at 688; Rice, *Attorney Client Privilege in the United States*, § 11:10.

Court's notes: Sustained on §.310(1)(j) and common interest grounds.

***DOCUMENT #54**, TF 00433: Controversy Exemption*

The redactions from this e-mail string, i.e., e-mails between AAG Todd Bowers, Brian Moran, and Sarah Sappington, relate to the AAG's mental impressions in response to a King County Prosecuting Attorney's statements on the C.J. Merritt letter with respect to Thorell and Spink. The redactions are proper under the controversy exemption.

PLAINTIFF'S RESPONSE TO DOCUMENT #54:

The redacted portions of Document #54 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to

Document #54. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Moreover, the State's claim of controversy is overbroad as it relates to Justice Sanders and not to any particular pending litigation. There is also no blanket exemption for attorney "mental impressions" unless related to work product for an existing controversy.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #55**, TF 00434: Controversy Exemption/Common Interest*

This is an e-mail string involving AAGs Todd Bowers, Greg Weber, and Sarah Sappington as well as King County Senior Deputy Prosecuting Attorney David Hackett relating to documents accepted by Justice Sanders during his SCC visit. The e-mails reference Spink, a "controversy" to which the State was party that was pending before the Washington Supreme Court at the date of the visit. The e-mails reflect the attorneys' reasoning and mental impressions on a matter of common interest, and are subject to the controversy exemption.

PLAINTIFF'S RESPONSE TO DOCUMENT #55:

Document #55 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof because it failed to present any testimony supporting the elements of the common interest doctrine and the required underlying privilege necessary to invoke the common interest doctrine, (2) the State cannot rely on the "common interest" doctrine since the State has not identified any underlying privilege that would trigger the doctrine, and the "common interest" doctrine alone does not justify the withholding of documents, and (3) the Controversy Exemption does not apply to Document #55. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Applying the definition of a controversy as set out in *Hangartner*, 151 Wn.2d at 450, the Controversy Exemption does not apply to the possibility of making a complaint to the Commission on Judicial Conduct.

Moreover, to the extent that the memorandum addresses issues unrelated to consideration of a recusal motion in a pending case, the State has not identified a controversy that would justify an exemption from disclosure and production. Thus, for example, to the extent that the memorandum addresses factual descriptions of Justice Sanders's visits, the Attorney General's decisions regarding participation in the visit, instructions to SCC personnel about how to proceed during Justice Sanders's visit, or like issues unrelated to legal advice or work product regarding the specific issue of recusal, the documents should be produced in redacted form.

Court's notes: Sustained on §.310(1)(j) and common interest grounds.

***DOCUMENT #56**, TF 00435: Controversy Exemption/Common Interest*

This is an e-mail from Snohomish County Prosecutor Seth Fine to AAG Todd Bowers and the King County Senior Deputy Prosecuting Attorney David Hackett about materials given to Justice Sanders by SCC residents during the Justice's tour. The document is subject to the controversy exemption of RCW 42.17.310(1)(j) for the same reasons stated with respect to Document #55.

PLAINTIFF'S RESPONSE TO DOCUMENT #56:

Document #56 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof because it failed to present any testimony supporting the elements of the common interest doctrine and the required underlying privilege necessary to invoke the common interest doctrine, (2) the State cannot rely on the "common interest" doctrine since the State has not identified any underlying privilege that would trigger the doctrine, and the "common interest" doctrine alone does not justify the withholding of documents, and (3) the Controversy Exemption does not apply to Document #56. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Applying the definition of a controversy as set out in *Hangartner*, 151 Wn.2d at 450, the Controversy Exemption does not apply to the possibility of making a complaint to the Commission on Judicial Conduct.

Moreover, to the extent that the memorandum addresses issues unrelated to consideration of a recusal motion in a pending case, the State has not identified a controversy that would justify an exemption from disclosure and production. Thus, for example, to the extent that the memorandum addresses factual descriptions of Justice Sanders's visits, the Attorney General's decisions regarding participation in the visit, instructions to SCC personnel about how to proceed during Justice Sanders's visit, or like issues unrelated to legal advice or work product regarding the specific issue of recusal, the documents should be produced in redacted form.

Court's notes: Sustained on §.310(1)(j) and common interest grounds.

***DOCUMENT #57**, TF 00436 – 442: Controversy Exemption/Common Interest*

This e-mail string, involving AAGs Todd Bowers, Greg Weber, Sarah Sappington, and Senior Deputy Prosecutor for King County, David Hackett, reflects the mental impressions of the attorneys regarding documents provided to Justice Sanders during his SCC visit, including a document accepted from Ralph Spink, who had a case pending before the Washington Supreme Court to which the State was a party. The e-mail string includes two of the e-mails included in Document #55 (TF 00434). The e-mails reflect the attorneys' reasoning and mental impressions on a matter of common interest, and are subject to the controversy exemption.

PLAINTIFF'S RESPONSE TO DOCUMENT #57:

Document #57 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof

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because it failed to present any testimony supporting the elements of the common interest doctrine and the required underlying privilege necessary to invoke the common interest doctrine, (2) the State cannot rely on the "common interest" doctrine since the State has not identified any underlying privilege that would trigger the doctrine, and the "common interest" doctrine alone does not justify the withholding of documents, and (3) the Controversy Exemption does not apply to Document #57. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Applying the definition of a controversy as set out in *Hangartner*, 151 Wn.2d at 450, the Controversy Exemption does not apply to the possibility of making a complaint to the Commission on Judicial Conduct.

Moreover, to the extent that the memorandum addresses issues unrelated to consideration of a recusal motion in a pending case, the State has not identified a controversy that would justify an exemption from disclosure and production. Thus, for example, to the extent that the memorandum addresses factual descriptions of Justice Sanders's visits, the Attorney General's decisions regarding participation in the visit, instructions to SCC personnel about how to proceed during Justice Sanders's visit, or like issues unrelated to legal advice or work product regarding the specific issue of recusal, the documents should be produced in redacted form.

Court's notes: Sustained on §.310(1)(j) and common interest grounds.

***DOCUMENT #58**, TF 00443 – 446: Controversy Exemption/Common Interest*

This document encompasses part of the e-mail string in Document #57 (TF 00436-442), and also includes two other e-mails on the same subject. The document is subject to the controversy exemption for the same reasons as Document #57.

PLAINTIFF'S RESPONSE TO DOCUMENT #58:

Document #58 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof because it failed to present any testimony supporting the elements of the common interest doctrine and the required underlying privilege necessary to invoke the common interest doctrine, (2) the State cannot rely on the "common interest" doctrine since the State has not identified any underlying privilege that would trigger the doctrine, and the "common interest" doctrine alone does not justify the withholding of documents, and (3) the Controversy Exemption does not apply to Document #58. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

See response to Document #57.

Court's notes: Sustained on §.310(1)(j) and common interest grounds.

***DOCUMENT #59**, TF 00447 – 450: Controversy Exemption/Common Interest*

This document encompasses part of the e-mail string in Document #57 (00436-442), and contains four additional e-mails relating to the documents accepted by

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Justice Sanders during his SCC visit. One of the e-mails is between AAGs, and the other three are between AAGs and Snohomish County Prosecuting Attorney Seth Fine, copied to King County Senior Deputy Prosecuting Attorney David Hackett. The e-mails reflect the attorneys' reasoning and mental impressions with respect to matters of common interest including Spivak, to which the State was a party, and are subject to the controversy exemption.

PLAINTIFF'S RESPONSE TO DOCUMENT #59:

Document #59 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof because it failed to present any testimony supporting the elements of the common interest doctrine and the required underlying privilege necessary to invoke the common interest doctrine, (2) the State cannot rely on the "common interest" doctrine since the State has not identified any underlying privilege that would trigger the doctrine, and the "common interest" doctrine alone does not justify the withholding of documents, and (3) the Controversy Exemption does not apply to Document #59. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

See response to Document #57.

Court's notes: Sustained on §.310(1)(j) and common interest grounds.

***DOCUMENT #60**, TF 00451 – 455: Controversy Exemption/Common Interest*

This document encompasses part of the e-mail string at Document #59 (TF 00447-450), but includes three additional e-mails involving AAGs Todd Bowers and Sarah Sappington, plus Snohomish County Prosecuting Attorney Seth Fine and King County Senior Deputy Prosecuting Attorney David Hackett, relating to documents received by Justice Sanders during his SCC visit. The reasoning and result should be the same as for Document #59.

PLAINTIFF'S RESPONSE TO DOCUMENT #60:

Document #60 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof because it failed to present any testimony supporting the elements of the common interest doctrine and the required underlying privilege necessary to invoke the common interest doctrine, (2) the State cannot rely on the "common interest" doctrine since the State has not identified any underlying privilege that would trigger the doctrine, and the "common interest" doctrine alone does not justify the withholding of documents, and (3) the Controversy Exemption does not apply to Document #60. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

See response to Document #59.

Court's notes: Sustained on §.310(1)(j) and common interest grounds.

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***DOCUMENT #61**, TF 00456 – 459: Controversy Exemption/Common Interest*

This document is identical to Document #60, TF 00451-455, except that one additional email from AAG Todd Bowers to AAGs Sarah Sappington and Brian Moran has been added on the same subject. The reasoning and result should be the same as for Document #60.

PLAINTIFF'S RESPONSE TO DOCUMENT #61:

Document #61 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof because it failed to present any testimony supporting the elements of the common interest doctrine and the required underlying privilege necessary to invoke the common interest doctrine, (2) the State cannot rely on the "common interest" doctrine since the State has not identified any underlying privilege that would trigger the doctrine, and the "common interest" doctrine alone does not justify the withholding of documents, and (3) the Controversy Exemption does not apply to Document #61. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

See response to Document #60.

Court's notes: Sustained on §.310(1)(j) and common interest grounds.

***DOCUMENT #62**, TF 00460 – 465: Controversy Exemption/Common Interest*

The redactions on this document are the same as Document #60, TF 00451-455. The reasoning and result should be the same.

PLAINTIFF'S RESPONSE TO DOCUMENT #62:

As the redacted portions of Document #62 are identical to Document #60, they were wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) and common interest grounds.

***DOCUMENT #63**, TF 00466 – 477: Controversy Exemption/Common Interest*

The redactions on this document are the same as Document #60, TF 00451-455. The redactions on TF 00466-471 are duplicated at TF 00473-477. The reasoning and results should be the same.

PLAINTIFF'S RESPONSE TO DOCUMENT #63:

As the redacted portions of Document #63 are identical to Document #60, they were wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) and common interest grounds.

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***DOCUMENT #64**, TF 00482: Controversy Exemption*

This document includes two e-mails involving AAG Sarah Sappington, Senior AAG Scott Blonien, AAG Brian Moran, Solicitor General Narda Pierce, Senior AAG Marnie Hart, Senior Counsel Paul Weisser, AAG Barbara Bailey, AG Senior Investigator Analysts Darrell Noble and Gary Fox, AAG Greg Weber, AAG Krista Bush, Paralegal Margaret Farmer, AAG Steve Rosen, Paralegal Summer Orth, Chief Deputy Attorney General Kathy Mix, and King County Senior Deputy Prosecuting Attorney David Hackett relating to Justice Sanders's decision to recuse himself in Thorell. It also includes two emails between AAGs Sarah Sappington and Steve Rosen on the same subject. The emails reflect the mental impressions of counsel in Thorell, and are subject to the controversy exemption.

PLAINTIFF'S RESPONSE TO DOCUMENT #64:

Document #64 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #64. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #65**, TF 00484: Controversy Exemption*

This e-mail string encompasses the earliest two of the e-mails in Document #64 (TF 00482), and adds two more, between AAG Todd Bowers, AAG Sarah Sappington, Senior AAG Scott Blonien, AAG Brian Moran, Solicitor General Narda Pierce, Senior AAG Marnie Hart, and Senior Counsel Paul Weisser, regarding Justice Sanders's recusal in Thorell. The e-mails all reflect the mental impressions of counsel with respect to Thorell or Spink, and are exempt from production under the controversy exemption.

PLAINTIFF'S RESPONSE TO DOCUMENT #65:

Document #65 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #65. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #66**, TF 00486 – 487: Controversy Exemption*

This redacted email is from AAG Todd Bowers to Senior Counsel Paul Weisser, Legal Assistant Macey Anthony, Legal Assistant Rebecca Jolliff, Legal Assistant Cynthia Lockridge, AAG Brian Moran, AAG Malcolm Ross, AAG Sarah Sappington, Legal Assistant Karen St. Charles, AAG Barbara Bailey, AG Senior Investigator Analysts Darrell Noble and Gary Fox, AAG Greg Weber, AAG Krista Bush, Paralegal Margaret

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Farmer, AAG Steve Rosen, and Paralegal Summer Orth regarding Justice Sanders's recusal in the Spink case. It should be subject to the same reasoning and result as Document #65.

PLAINTIFF'S RESPONSE TO DOCUMENT #66:

The redacted portions of Document #66 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #66. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #67**, TF 00488 – 499: Controversy Exemption/Common Interest*

This e-mail string contains two sets of the same redactions that are included in Document #60 (TF 00451-455), and are similarly subject to the controversy exemption.

PLAINTIFF'S RESPONSE TO DOCUMENT #67:

The redacted portions of Document #67 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof because it failed to present any testimony supporting the elements of the common interest doctrine and the required underlying privilege necessary to invoke the common interest doctrine, (2) the State cannot rely on the "common interest" doctrine since the State has not identified any underlying privilege that would trigger the doctrine, and the "common interest" doctrine alone does not justify the withholding of documents, and (3) the Controversy Exemption does not apply to Document #67. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

See response to Document #60.

Court's notes: Sustained on §.310(1)(j) and common interest grounds.

***DOCUMENT #68**, TF 00505 – 508: Controversy Exemption*

This redacted document encompasses the e-mail exchange at Document #52 (TF 00424-427) and includes three additional e-mails between AAG Sarah Sappington, Solicitor General Narda Pierce, AAG Brian Moran, AAG Todd Bowers, and Chief Deputy Attorney General Kathy Mix, regarding edits to a Sanders letter, and a Petition for Review regarding SCC resident Keith Rogers. The e-mails reflect the mental impressions and strategizing of counsel. The controversy exemption applies to this work product.

PLAINTIFF'S RESPONSE TO DOCUMENT #68:

The redacted portions of Document #68 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to

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meet its factual burden of proof because it failed to present any testimony supporting the elements of the common interest doctrine and the required underlying privilege necessary to invoke the common interest doctrine, (2) the State cannot rely on the "common interest" doctrine since the State has not identified any underlying privilege that would trigger the doctrine, and the "common interest" doctrine alone does not justify the withholding of documents, and (3) the Controversy Exemption does not apply to Document #68. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #69**, TF 00584 – 587: Controversy Exemption*

This document is comprised of two duplicate e-mail strings encompassed within Document #43 (see TF 00396) and a draft of the letter from the AG to Supreme Court Clerk C.J. Merritt. Other drafts of the letter are found at Documents #5, #40, #43; #48, and #52. The e-mails and documents, reflecting the mental impressions and comments of counsel with respect to the letter, fall within RCW 42.17.310 (1)(j) with respect to the Thorell controversy to which the State was a party.

PLAINTIFF'S RESPONSE TO DOCUMENT #69:

Document #69 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #69. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, the draft letter is not exempt from disclosure merely because it is a draft, as argued in Plaintiff's Response to Document #5.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #70**, TF 00594 – 609: Controversy Exemption*

This document is a list of pending Sexually Violent Predator Matters with redactions of handwritten notes by AAGs reflecting their mental impressions and assessments with respect to those cases. The redactions are work product in on-going controversies to which the State was a party (i.e., the cases identified) and are exempt from production under RCW 42.17.310(1)(j).

PLAINTIFF'S RESPONSE TO DOCUMENT #70:

The redacted portions of Document #70 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #70, and (3) the State may not rely on the work product doctrine.

Court's notes: Sustained on §.310(1)(j) grounds.

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***DOCUMENT #71**, TF 00614 – 617: Controversy Exemption*

This document is a memorandum identical (except for the date) to that contained in Document # 6 (TF 00076-79) relating to Justice Sanders's visit to the SCC, and is subject to the controversy exemption for the same reasons as in Document #6.

PLAINTIFF'S RESPONSE TO DOCUMENT #71:

As Document #71 is a duplicate of Document #6, except for a different date, it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #72**, TF 00618 – 626: Controversy Exemption*

This document consists of handwritten notes by AAG Todd Bowers to the file describing key issues in various cases pending before the Washington Supreme Court, and his notes on the Code of Judicial Conduct and the Commission on Judicial Conduct. This document reflects the mental impressions and strategy of counsel in the cases referenced, and is exempt from disclosure under RCW 42.17.310(1)(j).

PLAINTIFF'S RESPONSE TO DOCUMENT #72:

Document #72 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #72. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Applying the definition of a controversy as set out in *Hangartner,* 151 Wn.2d at 450, the Controversy Exemption does not apply to the possibility of making a complaint to the Judicial Conduct Commission.

Moreover, to the extent that the memorandum addresses issues unrelated to consideration of a recusal motion in a pending case, the State has not identified a controversy that would justify an exemption from disclosure and production. Thus, for example, to the extent that the memorandum addresses factual descriptions of Justice Sanders's visits, the Attorney General's decisions regarding participation in the visit, instructions to SCC personnel about how to proceed during Justice Sanders's visit, or like issues unrelated to legal advice or work product regarding the specific issue of recusal, the documents should be produced in redacted form.

Court's notes: Sustained for the first two pages on §.310(1)(j) grounds; **exemption denied** as to pages 3 – 9.

***DOCUMENT #73**, TF-00724 – 726: Controversy Exemption/Not Responsive*

This document is handwritten notes by Chief Deputy Attorney General Kathy Mix to the file with regard to Justice Sanders, and telephone calls with Justice Sanders's counsel, John Strait. The notes reflect the mental impressions of the State's attorney about an anticipated controversy (i.e., the denial of Justice Sanders's request for

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reimbursement of defense costs) and were properly withheld under the controversy exemption.

PLAINTIFF'S RESPONSE TO DOCUMENT #73:

Document #73 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #73. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, the State claims that the controversy at issue is Justice Sanders's request for the State to provide him a defense before the Commission on Judicial Conduct. However, the Original Exemption Log dates Document #73 to 12/00/2003, at least three months before Justice Sanders filed his lawsuit seeking such a defense. *See* Lawrence Decl. (November 28, 2005), Ex. C at 27. Merely a "litigation charged atmosphere" does not constitute as a "controversy" as defined in *Hangartner,* 151 Wn.2d at 450.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #74**, TF 00729 – 730: Controversy Exemption; Attorney-Client Privilege*

This document is a December 2003 e-mail between Solicitor General Narda Pierce and Chief Deputy Attorney General Kathy Mix, forwarding and commenting on a November 2000 e-mail exchange between Ms. Pierce, Deputy AG David Walsh, and the Attorney General's outside counsel, Peter Jarvis, regarding the statutes under which the State indemnifies state officials. The e-mails relate to the decision by Judge Hicks in the earlier action brought by Justice Sanders for reimbursement of his defense costs, and it can be reasonably inferred that the communications relate to the reasonably-anticipated lawsuit that Justice Sanders would bring (and did subsequently bring) if the State did not agree to reimburse his attorney's fees in defense of the CJC charges. Thus, the controversy exemption applies. The attorney-client privilege also applies to the confidential communications between the AG and its outside counsel, Peter Jarvis, and to Ms. Pierce's subsequent email relaying those confidential communications to Ms. Mix. RCW 5.60.060(2); RCW 42.17.260(1).

PLAINTIFF'S RESPONSE TO DOCUMENT #74:

Document #74 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #74. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, by requesting that the Court make inferences, Appendix A explicitly recognizes that the State lacks the necessary evidence to justify applying the Controversy Exemption to Document #74. A party invoking a privilege bears the burden of proof and, therefore, must include the applicable facts in an affidavit, not merely rely on the face of

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the documents. *Int'l Paper Co.*, 63 F.R.D. at 94; *Local 851*, 36 F. Supp.2d at 129; *In re Tex E. Transmission*, 1991 WL 87218 at *2; *Delco Wire*, 109 F.R.D. at 688; Rice, *Attorney Client Privilege in the United States*, § 11:10.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #75**, TF 00735: Controversy Exemption*

The redaction from this document is an email from Chief Deputy Attorney General Kathy Mix to Marty Brown, Director of the Office of Financial Management, and Wolfgang Opitz, Deputy Director, regarding a draft letter to Justice Sanders in response to his request for a publicly-funded defense in the CJC matter, and Marty Brown's response. The document reflects the mental impressions and analysis of counsel in a reasonably anticipated lawsuit, i.e., an action by Justice Sanders for payment of his defense costs. The controversy exemption applies.

PLAINTIFF'S RESPONSE TO DOCUMENT #75:

The redacted portions of Document #75 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #75. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, the State claims that the controversy at issue is Justice Sanders's request for the State to provide him a defense before the Commission on Judicial Conduct. However, the Original Exemption Log dates Document #73 to 1/08/2004, more than three months before Justice Sanders filed his lawsuit seeking such a defense. *See* Lawrence Decl. (November 28, 2005), Ex. C at 27. Merely a "litigation charged atmosphere" does not constitute as a "controversy" as defined in *Hangartner*, 151 Wn.2d at 450.

Court's notes: Sustained on §.310(1)(j) grounds. The text of the e-mail directly addresses the request for public defense that Justice Sanders had made at that time.

***DOCUMENT #76**, TF 00736 – 738: Controversy Exemption; Attorney-Client Privilege*

This document is comprised of handwritten notes by Chief Deputy Attorney General Kathy Mix to the file regarding a telephone conversation with the Attorney-General's outside counsel, Peter Jarvis, relating to Justice Sanders's demand for indemnification of defense costs. The notes, which reflect the thoughts, mental impressions, and observations of the State's attorney, come within the controversy exemption. They also reflect confidential attorney-client communications with the State's outside counsel, and are protected by the attorney-client privilege. RCW 5.60.060(2) and RCW 42.17.260(1).

PLAINTIFF'S RESPONSE TO DOCUMENT #76:

Document #76 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2)

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the Controversy Exemption does not apply to Document #76, and (3) the State may not rely on the attorney-client privilege.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #77**, TF 00747 – 749: Controversy Exemption; Attorney-Client Privilege*

This document is comprised of handwritten notes by Chief Deputy Attorney General Kathy Mix to the file regarding telephone calls with Justice Alexander and Justice Sanders. The notes from the conversation with Justice Alexander are protected by the attorney-client privilege, since the Attorney-General is counsel for the Supreme Court and the notes clearly reflect confidential communications. The notes from the conversation with Justice Sanders reflect the mental impressions and thought processes of counsel with respect to Justice Sanders's position, and are protected from disclosure by the controversy exemption. The controversy is the reasonably-anticipated lawsuit by Justice Sanders for a publicly-funded defense.

PLAINTIFF'S RESPONSE TO DOCUMENT #77:

Document #77 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #77, and (3) the State may not rely on the attorney-client privilege.

Additionally, the State dates Document #77 to August 2003 in the State's Original Exemption Log, more than three months before Justice Sanders requested that the State provide him a defense in the Commission on Judicial Conduct proceedings and nine months before Justice Sanders filed his lawsuit still seeking such a defense. The State has not shown how a controversy, as defined in *Hangartner,* 151 Wn.2d at 450, can exist regarding the denial of a publicly funded defense, when Justice Sanders had not even requested one.

The State also incorrectly asserts that there was an attorney-client relationship between Chief Deputy Attorney General Kathy Mix and Justice Alexander. According to the Supreme Court of Washington, "[f]or the purposes of claiming the attorney-client privilege, the existence of an attorney-client relationship turns largely on the client's subjective belief that it exists." *In re McGlothlen,* 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). The client's subjective belief is controlling on this issue if "it is reasonably formed based on the attending circumstances, including the attorney's words or actions." *Bohn v. Cody,* 119 Wn.2d 357, 363, 832 P.2d 71 (1992). Finally, "[t]he essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters." *Id.* According to Chief Justice Alexander, he did not seek the legal advice of Kathy Mix nor did she provide it. *See* Declaration of Chief Justice Gerry L. Alexander (11/28/05), ¶ 3-4. There was no attorney-client relationship between Chief Justice Alexander and Ms. Mix, and accordingly, the State can not claim any attorney-client privilege. Document #77 should have been produced.

Court's notes: Sustained on §.310(1)(j) grounds. The handwritten date on the notes is in the form "Dec 8/03", so perhaps the mistake in dates is attributable to that form. The issue of attorney-client relationship need not be decided because all of the notes are

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entitled to exemption under §.310(1)(j), including the very short section regarding the discussion with Chief Justice Alexander.

***DOCUMENT #78**, TF 00800: Controversy Exemption; Attorney-Client Privilege*

This is an e-mail from Chief Deputy Attorney General Kathy Mix to outside counsel Peter Jarvis forwarding a draft letter to Justice Sanders regarding his request for a public-funded defense (the draft is not included). The e-mail response from Mr. Jarvis to Kathy Mix's secretary, copied to Ms. Mix and Attorney General's Office Director of Administration Fred Olson, Senior AAG Howard Fisher, and Solicitor General Narda Pierce, is also included. The earlier email expressly asks for review and comment on the draft letter, and Mr. Jarvis' response comments on it. The document is both work product with respect to the reasonably anticipated lawsuit by Justice Sanders for defense costs, and a confidential attorney-client communication protected by RCW 5.60.060(2) and RCW 42.17.260(1).

PLAINTIFF'S RESPONSE TO DOCUMENT #78:

Document # was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document # 78, and (3) the State may not rely on the work product doctrine or the attorney-client privilege.

Additionally, the State claims that the controversy at issue is Justice Sanders's request for the State to provide him a defense before the Commission on Judicial Conduct. However, the Original Exemption Log dates Document #78 to 01/02/2004, more than three months before Justice Sanders filed his lawsuit seeking such a defense. *See* Lawrence Decl. (November 28, 2005), Ex. C at 8. Merely a "litigation charged atmosphere" does not constitute as a "controversy" as defined in *Hangartner*, 151 Wn.2d at 450.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #79**, TF 00801: Controversy Exemption; Attorney-Client Privilege*

This is the earlier e-mail encompassed within Document #78 (TF 00800). The controversy exemption and attorney-client privilege apply for the reasons stated for that document.

PLAINTIFF'S RESPONSE TO DOCUMENT #79:

As Document #79 is encompassed within of Document #78, it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #80**, TF 00802 – 818: Controversy Exemption*

This document is an e-mail from Judy Gaul of the Attorney General Office's Administration Division (Confidential Secretary to Chief Deputy Attorney General Kathy Mix) to Deputy AG David Walsh, Solicitor General Narda Pierce, and Senior AAG Howard Fischer, copied to Chief Deputy Attorney General Kathy Mix forwarding for

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review and comment a draft letter to Justice Sanders regarding his request for a publicly-funded defense, and three drafts of the letter itself. The e-mail and draft letters reflect the mental impressions of attorneys in a reasonably anticipated lawsuit by Justice Sanders for defense costs, and are protected by the controversy exemption.

PLAINTIFF'S RESPONSE TO DOCUMENT #80:

Document #80 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #80. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, the State claims that the controversy at issue is Justice Sanders's request for the State to provide him a defense before the Commission on Judicial Conduct. However, the Original Exemption Log dates Document #80 to 12-11-2003, more than three months before Justice Sanders filed his lawsuit seeking such a defense. *See* Lawrence Decl. (November 28, 2005), Ex. C at 28. Merely a "litigation charged atmosphere" does not constitute as a "controversy" as defined in *Hangartner,* 151 Wn.2d at 450.

Additionally, documents are not exempt from disclosure merely because they are drafts. A number of courts have held that there is no expectation of confidentiality in the drafts of documents prepared for disclosure to third parties. *See, e.g., Under Seal (In re Grand Jury Proceedings),* 33. F.3d at 354-55; *Under Seal,* 748 F.2d at 977; Rice, *Attorney-Client Privilege,* 48 Am. U. L. Rev. at 977. A draft document is also not privileged insofar as it is identical to the final version of the document which was submitted to a third party. *Andritz Sprout-Bauer,* 174 F.R.D. at 633; *Gutter* 1998 WL 2017926 at *6; *Boyd,* 88 S.W.3d at 225; *MessagePhone,* 1998 WL 874945.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #81**, TF 00829: Controversy Exemption*

This document is an e-mail string involving Chief Deputy Attorney General Kathy Mix and AAG Todd Bowers, Linda Fredericks, who was the Executive Assistant to Attorney General Christine Gregoire, Senior AAG Lucy Isaki, and AAGs Scott Blonien, Brian Moran, and Sarah Sappington regarding a 2/25/03 memorandum about Justice Sanders's SCC visit, and legal research on recusal procedure. The document reflects the attorneys' analysis and mental impressions with respect to the pending Washington Supreme Court controversies in which the State was a party, and a recusal motion potentially could be made. RCW 42.17.310(1)(j) applies.

PLAINTIFF'S RESPONSE TO DOCUMENT #81:

Document #81 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #81. Specifically, the State fails to even assert that this document would not be available under the rules of civil

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discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #82**, TF 00830 – 835: Controversy Exemption*

This is the same e-mail string and draft memorandum included at Document #6 (TF 00074-79) except that the memorandum bears a different date. They come within the controversy exemption for the reasons discussed for Document #6.

PLAINTIFF'S RESPONSE TO DOCUMENT #82:

As Document #82 is a duplicate of Document #6, only with a different date, it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #83**, TF 00844 – 848: Controversy Exemption/Common Interest*

This is the same as Document #10 (TF 00083-87), and is subject to the controversy exemption for the same reasons.

PLAINTIFF'S RESPONSE TO DOCUMENT #83:

As Document #83 is a duplicate of Document #10, it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) and common interest grounds.

***DOCUMENT #84**, TF 00849: Controversy Exemption/Common Interest*

This is the same as Document #9 (TF 00082), and is subject to the controversy exemption for the same reasons.

PLAINTIFF'S RESPONSE TO DOCUMENT #84:

As Document #84 is a duplicate of Document #9, it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained. Some parts on §.310(1)(j) grounds alone and other parts on §.310(1)(j) and common interest grounds.

***DOCUMENT #85**, TF 00852: Controversy Exemption*

This is the same as Document #11 (TF 00088), and is subject to the controversy exemption for the same reasons.

PLAINTIFF'S RESPONSE TO DOCUMENT #85:

As Document #85 is a duplicate of Document #11, it was wrongly withheld from production for the same reasons as argued above.

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Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #86**, TF 00853 – 855: Controversy Exemption*

This is the same as Document #40 (TF 00389-91), and is subject to the controversy exemption for the same reasons.

PLAINTIFF'S RESPONSE TO DOCUMENT #86:

As Document #86 is a duplicate of Document #40, it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #87**, TF 00856 — 858: Controversy Exemption*

This is the same as Document #40 (TF 00389-91) except with one further email from Solicitor General Narda Pierce to Attorney General Christine Gregoire regarding the draft letter to C.J. Merritt. The additional email and the remainder of the document are subject to the controversy exemption for the same reasons as stated for Document #40.

PLAINTIFF'S RESPONSE TO DOCUMENT #87:

As part of Document #87 is a duplicate of Document #40, it was wrongly withheld from production for the same reasons as argued above. Any additional portions of Document #87 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #87, and (3) the State may not rely on the work product doctrine.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #88**, TF 00859 — 860: Controversy Exemption*

This e-mail string is included within Document #43 (TF 00396) and is subject to the controversy exemption for the same reasons.

PLAINTIFF'S RESPONSE TO DOCUMENT #88:

As Document #86 is an encompassed in Document #43, then it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #89**, TF 00861 — 864: Controversy Exemption*

The e-mail string is the same as the string in Document #43 (TF 00395-396), although the interlineated draft of the letter to C.J. Merritt is different in minor respects from TF 00397-398. The controversy exemption applies for the reasons stated for Document #43.

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PLAINTIFF'S RESPONSE TO DOCUMENT #89:

As Document #89 is essentially a duplicate of Document #43, it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #90**, TF 00865 — 869: Controversy Exemption*

This is an e-mail string identical to Document #43 (TF 00395-396) but including an additional e-mail about the Merritt letter and a different draft of that letter. The controversy exemption applies for the reasons stated for Document #43.

PLAINTIFF'S RESPONSE TO DOCUMENT #90:

As part of Document #90 is a duplicate of Document #43, it was wrongly withheld from production for the same reasons as argued above. Any additional portions of Document #90 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #90, and (3) the State may not rely on the work product doctrine.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #91**, TF 00870 — 874: Controversy Exemption*

This is an e-mail string and draft letter identical to Document #90, TF 00865-869, and including an additional e-mail from AAG Brian Moran to Solicitor General Narda Pierce regarding the C.J. Merritt letter. The controversy exemption applies for the reasons stated for Document #43.

PLAINTIFF'S RESPONSE TO DOCUMENT #91:

As part of Document #91 is a duplicate of Document #90, it was wrongly withheld from production for the same reasons as argued above. Any additional portions of Document #91 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #91, and (3) the State may not rely on the work product doctrine.

See response to Document #43.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #92**, TF 00875 — 878: Controversy Exemption*

This redacted document is an e-mail string also within Document #52, at TF 00424-425 (duplicate at 00426-427). Also included is a draft of the C.J. Merritt letter in the Thorell and Spink matters. The controversy exemption applies for the reasons stated for Document #52.

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PLAINTIFF'S RESPONSE TO DOCUMENT #92:

As part of Document #92 is a duplicate of Document #52, it was wrongly withheld from production for the same reasons as argued above. Any additional portions of Document #92 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #92, and (3) the State may not rely on the work product doctrine.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #93**, TF 00881 – 882: Controversy Exemption*

This redacted document is found in Document #68, at TF 00507-508, and is subject to the controversy exemption for the same reasons as that document.

PLAINTIFF'S RESPONSE TO DOCUMENT #93:

As Document #93 is a duplicate of part of Document #68, it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #94**, TF 00884 – 886: Controversy Exemption*

This document is a draft of a "Screening Memorandum" from Deputy Attorney General Shirley Battan to "All Members of the Executive Team," "All Members of the Solicitor General's Office," and various AAGs as well as Senior AAG (Counsel) to the DSHS, Bill Williams, about the CJC Complaint against Justice Sanders as a result of his conduct at SCC. The memorandum discusses the processes the Attorney General's Office intended to adopt to ensure that various employees at the Attorney General's Office were screened in various on-going matters, and reflects counsel's reasoning as to why that screening was necessary. The document, exchanged among employees at the Attorney General's Office, reflects the internal thought processes and mental impressions of the attorneys in the various matters, including the sexually violent predator cases, the federal litigation challenging the quality of treatment in the SCC, and the CJC proceeding against Justice Sanders, in which an AAG was assigned as a legal advisor. Because the document relates to those on-going disputes, it is protected by the controversy exemption, 5.60.060(2); RCW 42.17.310(1)(j).

PLAINTIFF'S RESPONSE TO DOCUMENT #94:

Document #94 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #94. Specifically, the State does not identify any privilege that would properly exempt this document, a screening memorandum, from civil discovery. The State refers to RCW 5.60.060(2), the attorney client privilege statute, but fails to identify any "client" receiving legal advice in this document. Additionally, a "screening memorandum," like other documents that contain clients names or fee arrangements but do not constitute legal advice, is not protected by the attorney-client privilege. *Cf. Seventh Elect Church in Israel v. Rogers,* 102 Wn.2d at

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531 ("Fee arrangements usually fall outside the scope of the privilege simply because such information ordinarily reveals no confidential professional communication between attorney and client, and not because such information may not be incriminating."), *quoting In re Osterhoudt,* 722 F.2d 591, 593 (9th Cir. 1983). Nor does the mere fact that this document "relates" to ongoing disputes establish that it is attorney work product.

Court's notes: Exemption denied. This memorandum does not pertain to the litigation identified in my written opinion, so §.310(1)(j) does not apply. RCW 5.60.060(2) does not apply.

***DOCUMENT #95**, TF 00888 – 890: Controversy Exemption*

This is the same e-mail forwarding a draft of a letter to Justice Sanders that is found in Document #80, at TF 00802, plus a different draft of the letter. The e-mail and draft letter are exempt under RCW 42.17.310(1)(j) for the same reasons stated for Document #80.

PLAINTIFF'S RESPONSE TO DOCUMENT #95:

Document #95 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #95. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, documents are not exempt from disclosure merely because they are drafts. A number of courts have held that there is no expectation of confidentiality in the drafts of documents prepared for disclosure to third parties. *See, e.g., Under Seal (In re Grand Jury Proceedings),* 33. F.3d at 354-55; *Under Seal,* 748 F.2d at 977; Rice, *Attorney-Client Privilege,* 48 Am. U. L. Rev. at 977. A draft document is also not privileged insofar as it is identical to the final version of the document which was submitted to a third party. *Andritz Sprout-Bauer,* 174 F.R.D. at 633; *Gutter* 1998 WL 2017926 at *6; *Boyd,* 88 S.W.3d at 225; *MessagePhone,* 1998 WL 874945.

See also response to Document #80.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #96**, TF 00892 – 893: Controversy Exemption; Attorney-Client Privilege*

This is the same as Document # 74, TF 00729-730, and is subject to the controversy exemption and the attorney-client privilege for the same reasons.

PLAINTIFF'S RESPONSE TO DOCUMENT #96:

As Document #96 is a duplicate of Document #74, it was wrongly withheld from production for the same reasons as argued above.

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Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #97**, TF 00894 – 895: Controversy Exemption; Attorney-Client Privilege*

This document is comprised of handwritten notes to the file by Solicitor General Narda Pierce reflecting a telephone conference with Chief Deputy Attorney General Kathy Mix and outside counsel Peter Jarvis about Justice Sanders's request for a publicly-funded defense in connection with the CJC charges against him, and a conversation with Justice Sanders's attorney, John Strait. The notes reflect the mental impressions of Ms. Pierce and Ms. Mix on a reasonably-anticipated controversy with Justice Sanders regarding reimbursement of his defense costs, and thus are protected under RCW 42.17.310(1)(j). The notes also reflect confidential communications between the AG and its outside counsel and thus are protected by the attorney-client privilege. RCW 42.17.260(1); RCW 5.60.060(2).

PLAINTIFF'S RESPONSE TO DOCUMENT #97:

Document #97 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #97, and (3) the State may not rely on the attorney-client privilege.

Additionally, the State claims that the controversy at issue is Justice Sanders's request for the State to provide him a defense before the Commission on Judicial Conduct. However, the Original Exemption Log dates Document #97 to 12/16/2003, more than three months before Justice Sanders filed his lawsuit seeking such a defense. *See* Lawrence Decl. (November 28, 2005), Ex. C at 31. Merely a "litigation charged atmosphere" does not constitute as a "controversy" as defined in *Hangartner*, 151 Wn.2d at 450.

Court's notes: Sustained on §.310(1)(j) and RCW 5.60.060(2) grounds. These notes follow the notes in Documents #73 and #77, which were notes of earlier conversations between AAG Mix and Justice Sanders (#77) and his counsel (#73), which also discussed Justice Sanders' demand for public defense.

***DOCUMENT #98**, TF 00896 – 900: Controversy Exemption; Attorney-Client Privilege*

The redaction is an e-mail from the secretary of Peter Jarvis, outside counsel for the State, to Solicitor General Narda Pierce, forwarding a draft of the proposed letter to Justice Sanders in response to his request for a publicly-funded defense. The e-mail constitutes work product with respect to the reasonably-anticipated controversy with Justice Sanders regarding reimbursement of his defense costs, and thus are protected under RCW 42.17.310(1)(j). The document also reflects confidential communications between the AG and its outside counsel and thus are protected by the attorney-client privilege. RCW 42.17.260(1); RCW 5.60.060(2).

PLAINTIFF'S RESPONSE TO DOCUMENT #98:

The redacted portions of Document #98 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to

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meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #98, and (3) the State may not rely on the attorney-client privilege.

Additionally, the State claims that the controversy at issue is Justice Sanders's request for the State to provide him a defense before the Commission on Judicial Conduct. However, the Original Exemption Log dates Document #98 to 12/17/2003, more than three months before Justice Sanders filed his lawsuit seeking such a defense. *See* Lawrence Decl. (November 28, 2005), Ex. C at 31. Merely a "litigation charged atmosphere" does not constitute as a "controversy" as defined in *Hangartner,* 151 Wn.2d at 450.

Additionally, documents are not exempt from disclosure merely because they are drafts. A number of courts have held that there is no expectation of confidentiality in the drafts of documents prepared for disclosure to third parties. *See, e.g., Under Seal (In re Grand Jury Proceedings),* 33. F.3d at 354-55; *Under Seal,* 748 F.2d at 977; Rice, *Attorney-Client Privilege,* 48 Am. U. L. Rev. at 977. A draft document is also not privileged insofar as it is identical to the final version of the document which was submitted to a third party. *Andritz Sprout-Bauer,* 174 F.R.D. at 633; *Gutter* 1998 WL 2017926 at *6; *Boyd,* 88 S.W.3d at 225; *MessagePhone,* 1998 WL 874945.

Court's notes: Sustained on §.310(1)(j) and RCW 5.60.060(2) grounds as to the e-mail. It is not clear whether the draft letter was produced or not. I have sustained claims for exemption of similar drafts of this letter both earlier (Document #80) and immediately following (Document #99).

***DOCUMENT #99**, TF 00901 – 905: Controversy Exemption*

This is a draft of a letter by Chief Deputy Attorney General Kathy Mix to Justice Sanders declining a publicly-funded defense in the CJC matter, with handwritten interlineations and notes. The document reflects the mental impressions and reasoning of the AAG with respect to a reasonably-anticipated controversy with Justice Sanders regarding reimbursement of his defense costs, and thus is protected under RCW 42.17.310(1)(j).

PLAINTIFF'S RESPONSE TO DOCUMENT #99:

Document #99 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #99. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, the State claims that the controversy at issue is Justice Sanders's request for the State to provide him a defense before the Commission on Judicial Conduct. However, the Original Exemption Log dates Document #99 to 12/19/2003, more than three months before Justice Sanders filed his lawsuit seeking such a defense. *See* Lawrence Decl. (November 28, 2005), Ex. C at 31. Merely a "litigation charged atmosphere" does not constitute as a "controversy" as defined in *Hangartner,* 151 Wn.2d at 450.

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Even if Document #99 contains interlineations or other comments that are properly withheld from production, the State may choose to redact those specific portions, but is required to produce the rest of the document. The Washington Supreme Court had held that if a document "contains both exempt and non-exempt material, the exempt material may be redacted but the remaining material must be disclosed." *Amren v. City of Kalama,* 131 Wn. 2d 25, 32, 929 P.2d 389 (1997), *citing* RCW 42.17.310(2).

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #100**, TF 00906 – 913: Controversy Exemption*

This document includes an e-mail that is the same as Document #78, TF 00800, which is subject to the controversy exemption for the reasons stated for that document. The document also includes a draft letter from Chief Deputy Attorney General Kathy Mix to Justice Sanders declining a publicly-funded defense in the CJC matter, which is subject to the controversy exemption for the reasons stated with regard to Document #80, TF 00803-818.

PLAINTIFF'S RESPONSE TO DOCUMENT #100:

As part of Document #100 is a duplicate of Document #78, it was wrongly withheld from production for the same reasons as argued above. Additional portions of Document #100 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #100. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, the State claims that the controversy at issue is Justice Sanders's request for the State to provide him a defense before the Commission on Judicial Conduct. However, the Original Exemption Log dates Document #100 to 01/02/2004, more than three months before Justice Sanders filed his lawsuit seeking such a defense. *See* Lawrence Decl. (November 28, 2005), Ex. C at 31. Merely a "litigation charged atmosphere" does not constitute as a "controversy" as defined in *Hangartner,* 151 Wn.2d at 450.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #101**, TF 00919: Controversy Exemption; Attorney Client Privilege*

This document is an email between Solicitor General Narda Pierce and Chief Deputy Attorney General Kathy Mix, copied to Deputy AGs Jeffrey Goltz and David Walsh, regarding a conversation Ms. Pierce had with the State's outside counsel, Peter Jarvis, about Justice Sanders's lawsuit seeking a publicly-funded defense. The document reflects the mental impressions of the Deputy AGs with respect to a pending controversy under RCW 42.17.310(1)(j), and also confidential communications between the AGs and Mr. Jarvis that are subject to the attorney-client privilege.

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PLAINTIFF'S RESPONSE TO DOCUMENT #101:

Document #101 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #101, and (3) the State may not rely on the attorney-client privilege.

Additionally, the State claims that the controversy at issue is Justice Sanders's request for the State to provide him a defense before the Commission on Judicial Conduct. However, the Original Exemption Log dates Document #101 to 04/09/2004, before Justice Sanders filed his lawsuit seeking such a defense. *See* Lawrence Decl. (November 28, 2005), Ex. C at 31. Merely a "litigation charged atmosphere" does not constitute as a "controversy" as defined in *Hangartner,* 151 Wn.2d at 450.

Court's notes: Sustained on §.310(1)(j) and RCW 5.60.060(2) grounds.

***DOCUMENT #102**, TF 00922: Controversy Exemption/Not Responsive*

This redacted e-mail is the same as Document #20, TF 00177. The reasoning and result should be the same.

PLAINTIFF'S RESPONSE TO DOCUMENT #102:

As Document #102 is a duplicate of Document #20, it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Sustained. The redacted paragraph is not related to Justice Sanders' PDA request, and may be redacted for that reason.

***DOCUMENT #103**, TF-00928 – 930: Controversy Exemption*

This document is a draft of the screening memorandum discussed at Document #94, TF 00884-886, and requires the same reasoning and result as Document #94.

PLAINTIFF'S RESPONSE TO DOCUMENT #103:

As Document #103 is a duplicate of Document #94, it was wrongly withheld from production for the same reasons as argued above.

Court's notes: Exemption denied. This memorandum does not pertain to the litigation identified in my written opinion, so §.310(1)(j) does not apply. RCW 5.60.060(2) does not apply.

***DOCUMENT #104**, TF 00936 – 938: Controversy Exemption*

This document is an email from AAG Todd Bowers to Senior AG Scott Blonien, and AAGs Sarah Sappington and Brian Moran, forwarding a memorandum Mr. Bowers wrote for Senior AAG Lucy Isaki about documents relating to Justice Sanders's SCC visit. The memorandum is the same as Document #30, TF 00269-270. The entire document is subject to the controversy exemption for the reasons stated for Document #30.

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PLAINTIFF'S RESPONSE TO DOCUMENT #104:

As part of Document #104 is a duplicate of Document #30, it was wrongly withheld from production for the same reasons as argued above. Additional portions of Document #104 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #104, and (3) the State may not rely on the work product doctrine.

Court's notes: Exemption denied. In my written opinion I identified three examples of litigation that satisfy the first requirement of §.310(1)(j). The record here does not pertain to any of those litigations. The litigation anticipated here, a possible dispute over public records production, has not previously been mentioned in any material submitted by the AGO. The record does not contain evidence that would permit the court to conclude that it was reasonably anticipated.

***DOCUMENT #105**, TF 00954 – 957: Controversy Exemption*

The redaction in these notes of AAG Todd Bowers relates to the Attorney General Office's potential responses to Justice Sanders's SCC visit. Based on the statements in the redacted portion, it can be reasonably inferred that the "controversy" at issue was Thorell, Spink, and other cases pending before the Washington Supreme Court to which the State was a party, and in which Justice Sanders's recusal was a potential issue.

PLAINTIFF'S RESPONSE TO DOCUMENT #105:

The redacted portions of Document #105 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #105. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, by requesting that the Court make inferences, Appendix A explicitly recognizes that the State lacks the necessary evidence to justify applying the Controversy Exemption to Document #105. A party invoking a privilege bears the burden of proof and, therefore, must include the applicable facts in an affidavit, not merely rely on the face of the documents. *Int'l Paper Co.,* 63 F.R.D. at 94; *Local 851,* 36 F. Supp.2d at 129; *In re Tex E. Transmission,* 1991 WL 87218 at *2; *Delco Wire,* 109 F.R.D. at 688; Rice, *Attorney Client Privilege in the United States*, § 11:10.

Moreover, to the extent that the memorandum addresses issues unrelated to consideration of a recusal motion in a pending case, the State has not identified a controversy that would justify an exemption from disclosure and production. Thus, for example, to the extent that the memorandum addresses factual descriptions of Justice Sanders's visits, the Attorney General's decisions regarding participation in the visit, instructions to SCC personnel about how to proceed during Justice Sanders's visit, or like issues unrelated to legal advice or work product regarding the specific issue of recusal, the documents should be produced in redacted form.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #106**, TF 00985 – 995: Controversy Exemption; Attorney-Client Privilege*

This document is comprised of an e-mail string between Solicitor General Narda Pierce and the State's outside counsel, Peter Jarvis, copied to Senior AAG Marnie Hart, regarding a request for legal advice (TF 00985-987); attached notes for Mr. Jarvis about Justice Sanders's SCC visit and his contacts with residents (TF 00988-991); and an interlineated copy of the memorandum from AAG Todd Bowers to Attorney General Christine Gregoire that is also found (but without interlineations, and with different date) in Document #6 at TF 00076-79. The entire document constitutes a confidential communication between the AAG and outside counsel that is subject to the attorney-client privilege under RCW 42.17.260(1) and RCW 5.60.060(2). It also reflects the mental impressions and reasoning of the AAG with regard to cases pending before the Washington Supreme Court to which the State was a party, and thus is exempt from disclosure under RCW 42.17.310(1)(j).

PLAINTIFF'S RESPONSE TO DOCUMENT #106:

Document #106 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document # 106, and (3) the State may not rely on the attorney-client privilege.

Finally, even if Document #106 contains interlineations or other comments that are properly withheld from production, the State may choose to redact those specific portions, but is required to produce the rest of the document. The Washington Supreme Court had held that if a document "contains both exempt and non-exempt material, the exempt material may be redacted but the remaining material must be disclosed." *Amren v. City of Kalama,* 131 Wn. 2d 25, 32, 929 P.2d 389 (1997), *citing* RCW 42.17.310(2).

Applying the definition of a controversy as set out in *Hangartner,* 151 Wn.2d at 450, the Controversy Exemption does not apply to the possibility of making a complaint to the Judicial Conduct Commission.

Moreover, to the extent that the memorandum addresses issues unrelated to consideration of a recusal motion in a pending case, the State has not identified a controversy that would justify an exemption from disclosure and production. Thus, for example, to the extent that the memorandum addresses factual descriptions of Justice Sanders's visits, the Attorney General's decisions regarding participation in the visit, instructions to SCC personnel about how to proceed during Justice Sanders's visit, or like issues unrelated to legal advice or work product regarding the specific issue of recusal, the documents should be produced in redacted form.

Court's notes: Sustained on §.310(1)(j) and RCW 5.60.060(2) grounds.

***DOCUMENT #107**, TF 00996 – 998: Controversy Exemption; Attorney-Client Privilege*

This document consists of handwritten notes by Solicitor General Narda Pierce from a meeting or telephone call with Peter Jarvis, outside counsel for the State, regarding Justice Sanders visit to the SCC and potential recusal. The document constitutes a confidential communication between the AAG and outside counsel subject to

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the attorney-client privilege under RCW 42.17.260(1) and RCW 5.60.060(2). It also reflects the AAG's and/or Mr. Jarvis' mental impressions and reasoning, and it can be reasonably inferred that the discussion involves cases pending before the Washington Supreme Court to which the State was a party. Thus, RCW 42.17.310(1)(j) also applies.

PLAINTIFF'S RESPONSE TO DOCUMENT #107:

Document #107 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #107, and (3) the State may not rely on the attorney-client privilege.

Additionally, by requesting that the Court make inferences, Appendix A explicitly recognizes that the State lacks the necessary evidence to justify applying the controversy exemption to Document #107. A party invoking a privilege bears the burden of proof and, therefore, must include the applicable facts in an affidavit, not merely rely on the face of the documents. *Int'l Paper Co.*, 63 F.R.D. at 94; *Local 851*, 36 F. Supp.2d at 129; *In re Tex E. Transmission*, 1991 WL 87218 at *2; *Delco Wire*, 109 F.R.D. at 688; Rice, *Attorney Client Privilege in the United States*, § 11:10.

Applying the definition of a controversy as defined in *Hangartner*, 151 Wn.2d at 450, the Controversy Exemption does not apply to the possibility of making a complaint to the Judicial Conduct Commission.

Moreover, to the extent that the memorandum addresses issues unrelated to consideration of a recusal motion in a pending case, the State has not identified a controversy that would justify an exemption from disclosure and production. Thus, for example, to the extent that the memorandum addresses factual descriptions of Justice Sanders's visits or the Attorney General's decisions regarding participation in the visit, or instructions to SCC personnel about how to proceed during Justice Sanders's visit, or like issues unrelated to legal advice or work product regarding the specific issue of recusal, the documents should be produced in redacted form.

Court's notes: Sustained on §.310(1)(j) and RCW 5.60.060(2) grounds.

***DOCUMENT #108**, TF 00999: Controversy Exemption*

This document is the redacted transcription of a voicemail from Chief Deputy Attorney General Kathy Mix, commenting on a conversation with Justice Sanders's attorney, John Strait, with regard to possible resolution of the claim by Justice Sanders for a publicly-funded defense. The redaction reflects the mental impressions of Ms. Mix with respect to a reasonably-anticipated lawsuit by Justice Sanders, and thus is protected by the controversy exemption.

PLAINTIFF'S RESPONSE TO DOCUMENT #108:

The redacted portions of Document #108 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #108. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

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Additionally, the State claims that the controversy at issue is Justice Sanders's request for the State to provide him a defense before the Commission on Judicial Conduct. However, the Original Exemption Log dates Document #108 to 00/00/0000. *See* Lawrence Decl. (November 28, 2005), Ex. C at 34. The State has failed to establish that this document originated during an actual "controversy" as defined in *Hangartner*, 151 Wn.2d at 450. If this document was created before Justice Sanders filed his suit against the State, then it may only relate to a "litigation charged atmosphere," and not an actual controversy.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #109**, TF 01010 – 1012: Controversy Exemption*

This document consists of handwritten notes by Solicitor General Narda Pierce from a meeting with other AAGs regarding Justice Sanders's visit to the SCC and the potential effects on cases pending before the Washington Supreme Court to which the State was a party, including Spink. The notes reflect the mental impressions and analysis of counsel with regard to pending controversies to which the State was a party, and are exempted from disclosure under RCW 42.17.310(1)(j).

PLAINTIFF'S RESPONSE TO DOCUMENT #109:

Document #109 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #109. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Applying the definition of a controversy as set out in *Hangartner*, 151 Wn.2d at 450, the Controversy Exemption does not apply to the possibility of making a complaint to the Judicial Conduct Commission.

Moreover, to the extent that the memorandum addresses issues unrelated to consideration of a recusal motion in a pending case, the State has not identified a controversy that would justify an exemption from disclosure and production. Thus, for example, to the extent that the memorandum addresses factual descriptions of Justice Sanders's visits or the Attorney General's decisions regarding participation in the visit, or instructions to SCC personnel about how to proceed during Justice Sanders's visit, or like issues unrelated to legal advice or work product regarding the specific issue of recusal, the documents should be produced in redacted form.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #110**, TF 01013 — 1014: Controversy Exemption*

This document is an interlineated draft letter from AAG Brian Moran to be sent to defense counsel in cases pending before the Washington Supreme Court involving parties with whom Justice Sanders had interactions during his SCC tour. Another version of this letter is at Document #37, TF 00380-381. The letter is exempt from discovery under RCW 42.17.310(1)(j) as stated for Document #37, TF 00380-381.

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PLAINTIFF'S RESPONSE TO DOCUMENT #110:

Document #110 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #110, and (3) the State may not rely on the work product doctrine.

Additionally, even if Document #110 contains interlineations or other comments that are properly withheld from production, the State may choose to redact those specific portions, but is required to produce the rest of the document. The Washington Supreme Court had held that if a document "contains both exempt and non-exempt material, the exempt material may be redacted but the remaining material must be disclosed." *Amren v. City of Kalama,* 131 Wn. 2d 25, 32, 929 P.2d 389 (1997), *citing* RCW 42.17.310(2).

Applying the definition of a controversy as set out in *Hangartner,* 151 Wn.2d at 450, the Controversy Exemption does not apply to the possibility of making a complaint to the Judicial Conduct Commission.

Moreover, to the extent that the memorandum addresses issues unrelated to consideration of a recusal motion in a pending case, the State has not identified a controversy that would justify an exemption from disclosure and production. Thus, for example, to the extent that the memorandum addresses factual descriptions of Justice Sanders's visits or the Attorney General's decisions regarding participation in the visit, or instructions to SCC personnel about how to proceed during Justice Sanders's visit, or like issues unrelated to legal advice or work product regarding the specific issue of recusal, the documents should be produced in redacted form.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #111**, TF 01015 — 1016: Controversy Exemption*

This is another draft letter from an AAG to C.J. Merritt responding to his March 26, 2003 letter to counsel in Thorell, with handwritten interlineations and notes. Other drafts are found at Documents #5, #40, #43, #48, and #52. The draft is subject to the controversy exemption for the reasons stated with respect to those documents.

PLAINTIFF'S RESPONSE TO DOCUMENT #111:

Document #111 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #111, and (3) the State may not rely on the work product doctrine.

Additionally, documents are not exempt from disclosure merely because they are drafts. A number of courts have held that there is no expectation of confidentiality in the drafts of documents prepared for disclosure to third parties. *See, e.g., Under Seal (In re Grand Jury Proceedings),* 33. F.3d at 354-55; *Under Seal,* 748 F.2d at 977; Rice, *Attorney-Client Privilege,* 48 Am. U. L. Rev. at 977. A draft document is also not privileged insofar as it is identical to the final version of the document which was submitted to a third party. *Andritz Sprout-Bauer,* 174 F.R.D. at 633; *Gutter* 1998 WL 2017926 at *6; *Boyd,* 88 S.W.3d at 225; *MessagePhone,* 1998 WL 874945.

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Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #112**, TF 01017 — 1018: Controversy Exemption*

This is another draft of the letter reference in Document #111, and is subject to the controversy exemption for the same reasons.

PLAINTIFF'S RESPONSE TO DOCUMENT #112:

Document #112 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, (2) the Controversy Exemption does not apply to Document #112, and (3) the State may not rely on the work product doctrine.

Additionally, documents are not exempt from disclosure merely because they are drafts. A number of courts have held that there is no expectation of confidentiality in the drafts of documents prepared for disclosure to third parties. *See, e.g., Under Seal (In re Grand Jury Proceedings),* 33. F.3d at 354-55; *Under Seal,* 748 F.2d at 977; Rice, *Attorney-Client Privilege,* 48 Am. U. L. Rev. at 977. A draft document is also not privileged insofar as it is identical to the final version of the document which was submitted to a third party. *Andritz Sprout-Bauer,* 174 F.R.D. at 633; *Gutter* 1998 WL 2017926 at *6; *Boyd,* 88 S.W.3d at 225; *MessagePhone,* 1998 WL 874945.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #113**, TF 01019: Controversy Exemption*

This document consists of handwritten notes by Solicitor General Narda Pierce to the file with regard to documents accepted by Justice Sanders during his SCC tour. It also appears to address the AG's response to C.J. Merritt's letter of March 26, 2003. The notes reflect the mental impressions of an AAG with regard to "our pending case" in the Washington Supreme Court. The controversy exemption applies.

PLAINTIFF'S RESPONSE TO DOCUMENT #113:

Document #113 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #113. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Applying the definition of a controversy as set out in *Hangartner,* 151 Wn.2d at 450, the Controversy Exemption does not apply to the possibility of making a complaint to the Judicial Conduct Commission.

Moreover, to the extent that the memorandum addresses issues unrelated to consideration of a recusal motion in a pending case, the State has not identified a controversy that would justify an exemption from disclosure and production. Thus, for example, to the extent that the memorandum addresses factual descriptions of Justice Sanders's visits or the Attorney General's decisions regarding participation in the visit, or instructions to SCC personnel about how to proceed during Justice Sanders's visit, or like

issues unrelated to legal advice or work product regarding the specific issue of recusal, the documents should be produced in redacted form.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #114**, TF 01020: Controversy Exemption*

This document also consists of notes by Solicitor General Narda Pierce regarding Justice Sanders's visit to the SCC, and referencing the State's outside attorney, Peter Jarvis. It can be reasonably inferred that the notes refer to cases pending in the Washington Supreme Court to which the State was a party. The controversy exemption applies.

PLAINTIFF'S RESPONSE TO DOCUMENT #114:

The redacted portions of Document #114 were improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #114. Specifically, the State fails to even assert that this document would not be available under the rules of civil discovery. The State does not identify any applicable privilege to satisfy the second prong of the Controversy Exemption.

Additionally, by requesting that the Court make inferences, Appendix A explicitly recognizes that the State lacks the necessary evidence to justify applying the controversy exemption to Document #114. A party invoking a privilege bears the burden of proof and, therefore, must include the applicable facts in an affidavit, not merely rely on the face of the documents. *Int'l Paper Co.*, 63 F.R.D. at 94; *Local 851*, 36 F. Supp.2d at 129; *In re Tex E. Transmission*, 1991 WL 87218 at *2; *Delco Wire*, 109 F.R.D. at 688; Rice, *Attorney Client Privilege in the United States*, § 11:10.

Applying the definition of a controversy as set out in *Hangartner*, 151 Wn.2d at 450, the Controversy Exemption does not apply to the possibility of making a complaint to the Judicial Conduct Commission.

Moreover, to the extent that the memorandum addresses issues unrelated to consideration of a recusal motion in a pending case, the State has not identified a controversy that would justify an exemption from disclosure and production. Thus, for example, to the extent that the memorandum addresses factual descriptions of Justice Sanders's visits or the Attorney General's decisions regarding participation in the visit, or instructions to SCC personnel about how to proceed during Justice Sanders's visit, or like issues unrelated to legal advice or work product regarding the specific issue of recusal, the documents should be produced in redacted form.

Court's notes: Sustained on §.310(1)(j) grounds.

***DOCUMENT #115**, TF-01061 – 1063: Controversy Exemption; Attorney-Client Privilege*

This document consists of handwritten notes by Senior AAG Mary Tennyson to the file, regarding a telephone conference with the Executive Director of the CJC, Barrie Althoff, about Justice Sanders's visit to the SCC, his action for a publicly-funded defense in a previous case, and the potential for a request by Justice Sanders for a defense with

respect to the CJC charges. Because the notes reflect confidential information conveyed to and given by Ms. Tennyson, the AAG responsible for advising the CJC, the notes reflect attorney-client communications. Moreover, because the notes reflect the mental impressions of counsel in an on-going CJC investigation, RCW 42.17.310(1)(j) also applies.

PLAINTIFF'S RESPONSE TO DOCUMENT #115:

Document #115 was improperly withheld from production because, as discussed in the General Objections above: (1) the State failed to meet its factual burden of proof, and (2) the Controversy Exemption does not apply to Document #115.

In addition, the State failed to set forth the claimed exemption with the particularity required by the PDA, RCW 42.17.310(4), and CJC regulations. CJC regulations require that any exemptions claimed pursuant to the CJC regulations "include a statement of the specific exemption authorizing the refusal and a brief explanation of how the exemption applies to the record withheld." WAC 292-10-060. The State failed to include the specific statement required by WAC 292-10-060. The CJC log entry contains even less detail than other entries on the log. *See* Lawrence Decl. (November 28, 2005), Ex. C at 8 (Original Exemption Log noting that "Various" undated and unattributed documents were withheld pursuant, in part, to CJC statute RCW 2.64.111).

Finally, although this document purports to embody legal advice from the AGO to the Judicial Conduct Commission, at least a portion of this document relates not to the CJC proceedings themselves, but to Justice Sanders's request for a defense from the AGO. There would be no attorney-client relationship or rendering of legal advice as to that portion of the document. At a minimum, that portion should be produced with the remainder redacted. *Amren v. City of Kalama,* 131 Wn. 2d 25, 32, 929 P.2d 389 (1997) (holding that when a document "contains both exempt and non-exempt material, the exempt material may be redacted but the remaining material must be disclosed."); RCW 42.17.310(2).

Court's notes: Sustained on §.310(1)(j) grounds for that portion of the notes beginning on the first page with the line "prior action ag. Sanders" and encompassing the remainder of the record. **Exemption denied** as to the first part of the notes up to the line quoted above – the first nine lines after the date.

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Appendix B – Subsequently Produced Records
Court's Decisions on Initial Claim for Exemption

Grouping No. 1

A. E-mail cover sheets transmitting documents.

DOCUMENT #5. Document 5 is TF-00019. Exemption was claimed for TF-00019 – TF-00024 on §.310(1)(j) grounds and on the grounds that they were Not Responsive to Scope of Request. Exemption was sustained for TF-00020 – TF-00024 on §.310(1)(j) grounds. Here exemption of TF-0019 from the initial production is sustained on grounds that the scope of request did not include documents for the purpose of the fulfilling Mr. Fords PDA request.

DOCUMENT #7. Sustained on §.310(1)(j) grounds.

DOCUMENT #10. Sustained on §.310(1)(j) grounds.

DOCUMENT #18. Sustained on §.310(1)(j) grounds.

DOCUMENT #28. Sustained on §.310(1)(j) grounds.

DOCUMENT #29. Sustained on §.310(1)(j) grounds.

DOCUMENT #31. Sustained on §.310(1)(j) grounds.

DOCUMENT #34. Sustained on §.310(1)(j) grounds.

DOCUMENT #44. Sustained on §.310(1)(j) grounds.

DOCUMENT #45. Sustained on §.310(1)(j) grounds.

DOCUMENT #50. Sustained on §.310(1)(j) grounds.

DOCUMENT #51. Sustained on §.310(1)(j) grounds.

DOCUMENT #54. Sustained on §.310(1)(j) grounds.

B. E-mails regarding scheduling and logistics

DOCUMENT #9. Sustained on §.310(1)(j) grounds.

DOCUMENT #24. Sustained on §.310(1)(j) grounds.

DOCUMENT #27. Sustained on §.310(1)(j) grounds.

0-000001435

DOCUMENT #30. Sustained on §.310(1)(j) grounds.

DOCUMENT #41. Sustained on §.310(1)(j) grounds.

C. E-mails communicating attorneys' selected facts, opinions.

DOCUMENT #3. **Exemption denied** for the first sentence of the first paragraph and the second paragraph. Exemption of the rest of the e-mail is sustained on §.310(1)(j) grounds.

DOCUMENT #11. Sustained on §.310(1)(j) grounds.

DOCUMENT #16. Sustained on §.310(1)(j) grounds. This matches *in camera* review Document #22, the Bernie Friedman e-mail string claimed exempt under §.310(1)(j), and sustained.

DOCUMENT #17. Sustained on §.310(1)(j) grounds.

DOCUMENT #19. Sustained on §.310(1)(j) grounds.

DOCUMENT #20. Sustained on §.310(1)(j) grounds. This disclosed comment is part of a much longer e-mail string among lawyers regarding strategy for complaining to the Supreme Court about Justice Sanders' SCC visit. The complete string is *in camera* review Document #31 – and exemption of the redacted material is sustained. In context it was not unreasonable to claim exemption on this later disclosed record, TF-00303, and TF-00303 meets the tests of §.310(1)(j). It pertains to litigation and it is an expression of opinion by a lawyer about a course of action concerning that litigation.

DOCUMENT #21. Sustained on §.310(1)(j) grounds. This two line e-mail responds to *in camera* review document #31.

DOCUMENT #23. Sustained on §.310(1)(j) grounds.

DOCUMENT #26. Sustained on §.310(1)(j) grounds. These three disclosed e-mails are part of a longer e-mail string with comments on a letter, *in camera* review Document #39, and that claim for exemption is sustained. The AGO opted to release the last three e-mails, TF-00386, apparently because they only discuss logistics for completing the letter. Nevertheless, exempting them on July 8, 2004, was reasonable and met the tests of §.310(1)(j).

DOCUMENT #37. Sustained on §.310(1)(j) grounds. Continuation of e-mail string that is Document 11, TF-00140.

DOCUMENT #48. Sustained on §.310(1)(j) grounds.

DOCUMENT #52. Sustained on §.310(1)(j) grounds.

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DOCUMENT #57. Of all the exemptions I have been called upon to review, this is the most vexing. It is an email to the AGO from a News Tribune reporter, and the original claim of exemption was "Not Responsive to Scope of Request." The record was nevertheless disclosed; but it was not produced. (In other instances where the AGO used the note, "Not Responsive to Scope of Request", it was to designate a redacted portion of a record that was otherwise responsive, and so was disclosed and produced.) To determine if Document #57 is responsive to Mr. Bulmer's letter of request, the language of that document controls. Although the letter is addressed to the AGO's Public Records Office, it requests "All records and communications to or from anyone at DSHS with anyone else, including . . . anyone at the Washington State Attorney General's office, . . . any member of the media . . ." This e-mail does not involve anyone at DSHS, and is not an internal communication covered by the second part of Mr. Bulmer's request. I conclude that it is not within the scope of Mr. Bulmer's request. Nevertheless, the AGO contends that the search, disclosure, and production was actually done in response to Mr. Ford's request, and Document #57 is clearly within the scope of that broader request. If the issue of exemption was still before the court, I would not permit the exemption; but that issue is no longer before me. Rather, the issue here is whether failure to produce was a violation of the PDA that entitles Justice Sanders to a penalty under §.340(4). I conclude that it is a violation, but at best a *de minimus* violation. **Exemption is denied.**

D. Copy of cases, court rule

DOCUMENT #32. This document is a copy of a Mississippi Supreme Court decision regarding involuntary recusal of a Supreme Court Justice that was grouped with research notes that are *in camera* review Document #72. After review of those notes, I determined that a portion, TF-00618 – TF-00619 was exempt. Exemption was denied for TF-00620 – TF-00626. The Mississippi decision seems to be more related to the latter group of notes, specifically regarding Canon 3(D)(1). Accordingly **exemption is denied** as to Document #32. In considering what penalty, if any, should be assessed against the AGO, this Document #32 and *in camera* review Document #72 should be considered as one public record.

Grouping No. 2

DOCUMENT #56. Sustained pursuant to RCW 2.64.111. This 39 page document is a series of communications between Justice Sanders, and his lawyers, and various CJC staff members. These are clearly exempt from PDA production pursuant to RCW 2.64.111.

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APPENDIX III

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DEPUTY

SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

THE HONORABLE RICHARD SANDERS,

Plaintiff(s),

v.

STATE OF WASHINGTON,

Defendant(s).

NO. 05-2-01439-1

AMENDED COURT'S OPINION

This matter is presented to the court on dual tracks. First the parties presented a stipulated order to show cause for hearing pursuant to RCW 42.17.340(2). My oral explanation at the time of hearing on February 10, 2006, tracks this order to show cause to the hearing on that date. After entry of the stipulated order to show cause, each party moved for summary judgment pursuant to CR 56. Those cross motions also came to court for argument on February 10. Judicial review of public disclosure requests may be had either pursuant to RCW 42.17.340(2) or CR 56, and in both the review may be based solely on affidavits or declarations. Nevertheless, the distinction between statute and court rule is important. Under RCW 42.17.340(2) a court may enter findings of fact based upon evidence presented at the hearing, even if that evidence is solely by affidavit or declaration. Under CR 56 fact finding is not permitted and the evidence is viewed in the light most favorable to the non-moving party. At the beginning of the hearing, I opined that disputed issues of

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material fact precluded entry of summary judgment for either party and that consideration of the issues presented would be had pursuant to the show cause procedure in §.340(2). At the conclusion of oral arguments, each party was given the opportunity to request an additional evidentiary hearing. Justice Sanders declined the opportunity; the Attorney General's Office accepted only conditionally – and that condition is not applicable to the grounds upon which this case is decided.

This court uses the following terminology in discussion of public records arguably subject to a Public Disclosure Act request:

- Records are either disclosed or not disclosed. A record not disclosed means that its existence was not made known to the PDA requestor in the PDA response.
- Disclosed records are either produced (made available for inspection and copying) or claimed exempt from production in the PDA response. (Additionally, where production of a specifically identified document is demanded in the PDA request and is therefore disclosed in the request, the responding agency may deny that the document is a public record and so refuse to produce the record.)
- A public record encompassed by a PDA request is never exempt from disclosure.
- A claim for exemption from production may be either valid or invalid, and that determination is reserved to the courts.

Consideration of the issues in this case begins with the Public Disclosure Act request authored by Mr. Bulmer on behalf of Justice Sanders and received by the AGO on June 17, 2004. Response to the PDA request was made by the AGO on July 8, 2004, by disclosure of all public records at issue in this case. Some disclosed records were produced; others were claimed exempt and not produced. Of that latter group, some records were produced after this lawsuit was filed on July 22, 2005. The AGO has not disclosed any public records after the July 8, 2004, disclosure; and Justice Sanders has not identified or described any public records he believes were subject to his request and not disclosed. Nevertheless, Justice Sanders contends that the AGO's disclosure of public records to him on July 8, 2004, violated the PDA. This contention is premised on the belief that Mr. Bulmer received disclosure of only those records disclosed pursuant to a nearly concurrent PDA request by Mr. Ford. In response, the AGO acknowledges that it did not do a separate public records search in response to Mr. Bulmer's request, but it argues that Mr. Ford's request was broader than Mr. Bulmer's and encompassed

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all of the public records covered by Bulmer's request. The AGO also argues that its representative and Mr. Bulmer made an enforceable oral agreement amending Bulmer's request to be exactly co-extensive with the state's disclosure to Mr. Ford (defendant's memorandum, p. 6). Accordingly, the first issue addressed is whether the AGO's disclosure to Justice Sanders complied with the law and was based upon a legally sufficient search for public records.

Sufficiency of Search and Disclosure

I conclude that the AGO made a legally sufficient search for public records in response to Mr. Bulmer's request and that its disclosure complied with the PDA.

Attorney Timothy Ford submitted a PDA request to the AGO on April 4, 2004. His request referenced the Commission on Judicial Conduct case number 4072-F-109, the case concerning Justice Sanders then pending before the CJC. As the CJC decision makes clear, the complaint encompassed the period of time around the visit by Justice Sanders to the SCC on January 27, 2003, beginning with the invitation on December 17, 2002, and continuing through at least May 12, 2003, when Justice Sanders recused himself from the *In re Detention of Thorell* appeal. The CJC complaint was filed on March 19, 2003, so the CJC investigation and subsequent decision extended to events well after the filing of the complaint.

The scope of Mr. Ford's request was explained in five bulleted descriptions, beginning:

- All records and communications sent and received with the Commission on Judicial Conduct related to the above matter including Commission Board Members and staff members.

This first description was subsumed by a boarder statement in the second:

- All records and communications sent and received with any person or entity related to the above matter.

Then followed three bulleted items only indirectly related to the complaint to the CJC or action by the CJC. These three items addressed the matter of representation before the CJC:

- All records and communications related to a request for representation by or on behalf of Justice Sanders related to the above matter.
- All records and communication related to Kate Pflaumer being selected as counsel for the prosecution of the above matter.

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- All internal records and communications from the Office of Attorney General related to the above matter or any request for representation on the matter.

Upon receipt of the Ford request, the AGO undertook its response and completed that on July 8, 2004, without complaint or objection.

During the intervening period, Mr. Bulmer filed his request, the subject of which was identified as Justice Richard Sanders. There are two parts to the request in Mr. Bulmer's letter. The first part requests:

> [A]ll records related to a visit by Justice Richard Sanders to the Special Commitment Center on McNeill Island January 27, 2003, and subsequent actions by the Commission on Judicial Conduct in regards to this visit. This records request includes records both before and after the visit, the planning for the visit and follow-ups after the visit.

The second part of the request in Mr. Bulmer's letter cast its net far beyond the AGO. Included in that part, was the following as it relates to the AGO:

> Please provide all [sic] document related to such matters including but not limited to: all records and communications to or from anyone at DSH with . . . anyone at the Washington State Attorney General's office . . . regarding in any way the visit by Justice Sanders to the Special Commitment Center on McNeill Island and/or regarding in any way the Commission on Judicial Conduct in regards to Justice Sanders.[1]

The first part of Mr. Bulmer's request encompasses the visit, including planning and follow-up, and subsequent actions by the CJC. These two elements – the visit and the subsequent actions – are redundant because the CJC's subsequent actions included the investigation that encompassed the period from the invitation to Justice Sanders on December 17, 2002, to his recusal on May 12, 2003. The second part of Mr. Bulmer's request is equally broad – it seeks records regarding in any way the visit by the Justice or the CJC's actions – but it is directed, in relevant part, to records and communications to or from anyone at DSHS with . . . anyone at the Washington State Attorney General's office . . ..

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[1] In this passage, Mr. Bulmer requested all records and communications to and from anyone at DSH with anyone else and thereafter listed a number of state agencies, including the AGO. He also requested all internal records and communications of DSHS regarding this matter. Ms. Jensen, the AGO public records officer, declared that she contacted Mr. Bulmer and explained that the AGO would respond by disclosing its public records, but that Mr. Bulmer's request to other agencies under the Public Disclosure Act should be directed to those agencies. It is not clear whether Mr. Bulmer made such additional requests, but that aspect of his request is not part of this case.

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When Mr. Bulmer's request is compared to Mr. Ford's request for all records and communications sent and received with any other person or entity to the above matter, it is evident that there is no significant difference between the two; neither is measurably broader than the other. Mr. Ford's letter then requests records concerning the issue of representation for the parties before the CJC. That is a conspicuous addition to his request, one not mentioned in Mr. Bulmer's request. Viewed in this light, Ms. Jensen, AGO's public records officer, reasonably concluded that Mr. Ford's request was broader than Mr. Bulmer's. The first part of Mr. Bulmer's request focuses on the Justice's visit on McNeill Island and subsequent actions by the CJC. The record here does not disclose that the CJC was concerned with Justice Sanders' defense costs; that was a matter between an elected official of the state and the state. The second part of Mr. Bulmer's request is very broad, but is focused on records passing between DSHS and the AGO. The record does not disclose that DSHS was concerned with Justice Sanders' defense costs. Accordingly, I find that Mr. Ford's request was broader than, or at least as broad as, Mr. Bulmer's request.

I find that after receipt of the two requests, the AGO completed its record search and review, and on July 8, 2004, disclosed to Mr. Ford and Mr. Bulmer all the same records. The AGO produced the same records to each and claimed the same exemptions as to each.

The parties dispute the details of communication between Ms. Jensen and Mr. Bulmer between the time of his request and the AGO's disclosure; the AGO contends an agreement was reached, Justice Sanders denies that. I make no findings about this issue because it is not material to the decision in this case. It is not material to this case because I conclude that under the PDA an agency that receives two concurrent requests[2] for the same records discharges its responsibility for each request if it makes one legally sufficient search and discloses the same records to each. This conclusion applies where the two requests direct a search for the same records during the same time period, as here. If one request directs search of a slightly larger universe of records, the agency

[2] Concurrency of request does not mean that two requests must be received on the same day. Rather, they may be *reasonably contemporaneous* but must encompass the same timeframe. Such was the case here, the search was concluded and the disclosure, production, and claims for exemption were made to both parties on the same day.

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discharges its responsibility to each requestor if it makes one search and discloses the results of the broader search to each. As noted at the beginning of this section, I conclude that the AGO made a legally sufficient search for public records in response to Mr. Bulmer's request and that its disclosure complied with the Public Disclosure Act. These conclusions do not rely on any purported agreement between the parties and so no findings are made on that allegation.

The disclosure to Justice Sanders (and Mr. Ford) was in the form of an Entire Document Index that disclosed the existence of 334 public records. Concurrently with disclosure, 216 records were produced, and of these 26 had portions redacted, based upon claims of exemption. The remaining 118 records were not produced in any form, also based upon claims of exemption. The claims for exemption appeared in a column of the Entire Document Index labeled Privilege. The vast majority of the 144 public records claimed to be totally or partially exempt from production bore the single notation RCW 42.17.310(1)(j) in the Privilege column. Justice Sanders contends that this extremely brief form of exemption claim does not comport with RCW 31.17.310(4), which provides:

> Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.

He contends that the AGO must rely only on the information provided at the time of disclosure, July 8, 2004, and if that is inadequate, must produce the records.

Adequacy of the Claim of Exemption

I find that the AGO has identified a basis for each claim of exemption asserted in the Entire Document Index. In most instances the claim is identified as being made pursuant to RCW 42.17.310(1)(j), though in some instances more than one statute is identified.[3] I conclude that the part of §.310(4) requiring a statement of the specific exemption has been adequately satisfied.

[3] In several instances the Privilege column lists "Redacted – Not Responsive to Scope of Request" as the reason for a redaction. While this is not a basis for exemption, it is permissible to redact from a public record information that is not within the scope of the PDA request. *In camera* examination of that redacted material confirms that it is outside the scope of Justice Sanders' request.

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It is settled law that an agency may claim additional or different exemptions during judicial review. In *PAWS v. UW (II)*, 125 Wn.2d 243, 253 (1994), the Supreme Court rejected the contention that an agency should be limited to arguing only those exemptions identified in the agency's initial response.

I conclude that the part of §.310(4) requiring a brief explanation of how the exemption applies to the record withheld has not been satisfied. It is clear that the Entire Document Index is devoid of any explanation.

The phrase "brief explanation" is not further defined in §.310(4), and this responsibility has not been specifically addressed in any appellate decision brought to my attention. However, where no explanation at all is offered by the agency, it is clear that the agency has failed to comply with this requirement.

The PDA does not provide a specific consequence for failure to provide the required brief explanation. Significantly, the PDA does not compel production of public records, otherwise exempt from production under §.310(1), because of an agency's failure to comply with the brief explanation requirement of §.310(4) or any other provision of the PDA. No provision of the PDA or judicial construction thereof causes an exempt public record to lose its exemption by reason of agency action or inaction in response to a request for inspection. Instead, the PDA provides recourse to the courts for the requesting party, places the burden of proof on the agency, and permits very significant penalties to be imposed against any agency that wrongfully withholds production of a public record.

I note this important principle because Justice Sanders[4] argues, albeit indirectly, that he is entitled to production of all records by reason of the AGO's failure to provide the required brief explanation in the Entire Document Index on July 8, 2004. He argues that the AGO is precluded from offering any explanation for the claimed exemption other than the one offered at the time of

[4] Justice Sanders is identified as the party advancing this argument in keeping with modern court practice that identifies parties by names or unique identifiers rather than the generic designations of plaintiff and defendant. The acts, arguments, and contentions attributed to Justice Sanders were all made by his attorneys acting in his behalf.

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initial disclosure. Since no explanation other than identification of the claimed exemption was offered initially, he argues that the AGO cannot meet its burden of proving that any of its claims for exemption is in accordance with §.310(1)(j). Justice Sanders objects to the directive from this court that permitted the AGO to provide such explanation.

I am not persuaded by this argument. I conclude that the AGO's violation of the brief explanation requirement in §.310(4) does not entitle Justice Sanders to production of otherwise exempt public records and does not preclude this court from requesting an explanation for consideration during *in camera* examination. I conclude that the remedy for the AGO's violation of §.310(4)[5] is consideration of costs, attorneys fees, and penalties pursuant to RCW 42.17.340(4).

In *Citizens v. Dept. of Corrections,* 117 Wn. App. 411 (2003), the Court of Appeals considered a case where the agency failed to identify any exemption provided in §.310(1) and failed to provide any brief explanation for withholding production of numerous records. The Court of Appeals found a violation of §.310(4) but nevertheless permitted the agency to assert the exemption provided in §.310(1)(a) and assumed, without deciding, that the exemption applied. The Court of Appeals imposed the penalty provisions of §.340(4) for the violation, but did not require production of the records as a penalty.

Having concluded that the AGO conducted a legally adequate search and disclosure of public records on July 8, 2004, and having concluded that the AGO may provide to the court an explanation of its claims for exemption for use during *in camera* examination, I next turn to assessment of each public record claimed exempt. These records are considered in two groups, but the standards for judging each are the same.

The first group of records are those still withheld from production and submitted for *in camera* review. The second group is 33 records[6] initially claimed exempt but then subsequently

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[5] The violation of §.310(4) applies only to those exemptions asserted under §.310(1), not exemptions asserted under a different statute – e.g., RCW 50.60.060(2).

[6] In materials submitted to the court, Justice Sanders claimed as many as 70 records were included in the supplement productions in September 2005. However, in his letter dated February 14, 2006, Mr. Leyh explained the supplemental productions and identified duplicate claims for exemption, duplicate records, and five records from which portions were redacted because the information was outside the scope of the PDA request. He concluded that there were 33 actual records

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produced after Justice Sanders filed this lawsuit. Justice Sanders argues that the subsequent production of the records should be treated as evidence that the initial claims for exemption were wrongful, and urges the court to find that each claim was a violation of the PDA which entitles Justice Sanders to costs, fees, and penalties under RCW 42.17.340(4).

I am not persuaded by this argument. I find that when Justice Sanders' lawsuit was filed a year after the initial production, the AGO retained independent who reviewed all of the records previously withheld.[7] Independent counsel determined that some records should be produced to Justice Sanders in order to reduce the extent of the conflict raised by his lawsuit. The transmittal letters accompanying the subsequently produced records reserved the claims for exemption. I find this explanation by the AGO credible.

The AGO argues that an agency should not be penalized for voluntarily producing records after a claim of exemption unless the claim was wrongful. I agree. The goal of the PDA to foster liberal disclosure of public records is fostered when an agency is permitted to later disclose validly exempt records when the agency has no interest in continuing to withhold the records. This is especially true when a considerable period of time has passed between the initial claim of exemption and later production of the record. Conversely, the goal of the PDA is stifled if any voluntary production after initial claim of exemption results in penalties to the agency. The better approach is judicial review of the initial claim of exemption. I conclude that if the claim of exemption was wrongful, the agency should be penalized under 340(4) up to the date of voluntary production, but if the claim is sustained, the agency should suffer no penalty.

In this case, I have reviewed the claims for exemption of the 33 subsequently disclosed records, using the same standards applied to the records reviewed *in camera.*

claimed exempt but produced in order to minimize matters in dispute. I have reviewed Mr. Leyh's letter and find it reliable. Accordingly the 33 records identified on page 3 of the letter are those reviewed by the court in this second group.

[7] This lawsuit was filed July 22, 2005; the amendment adding the one year statute of limitations in RCW 42.17.240(6) did not become effective until two days later.

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Standards for Application of RCW 42.17.310(1)(j)

Nearly all of the AGO's claims for exemption are made pursuant to RCW 42.17.310(1)(j), the work product exemption. That subsection provides:

> [The following are exempt from public inspection and copying:] 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 Superior Courts.

To prevail on its claims for exemption, the AGO must prove that the document is relevant to completed, existing or reasonably anticipated litigation (*Dawson v. Daly,* 120 Wn.2d 782, 791 (1993)) and that the records requested are work product (*Limstrom v. Ladenburg,* 136 Wn.2d 595, 612 (1998)).

I conclude that the litigation identified by the AGO as justification for its reliance upon §.310(1)(j) is litigation that fits comfortably within the judicially developed standards for "relevant to a controversy" as that phrase is used in the statute. In the disclosed portion of this record, the AGO supplies evidence that there were controversies encompassed by §.310(1)(j) during the time when the records withheld from production were created and at the time their production was requested by Justice Sanders. That evidence is contained in the declarations of Batten[8] and Thomsen. While Ms. Batten's declaration identifies generally the completed, existing, or reasonably anticipated litigation alleged to be the basis for the claimed exemption, Mr. Thomsen's declaration attaches documents that specifically identify the litigation in question. They are:

- *In Re Detention of Thorell*, 149 Wn.2d 724, decided on July 10, 2003. This was litigation before the Supreme Court at the time Justice Sanders participated in the visit to the SCC on January 27, 2003.
- *In Re Detention of Spink,* a petition for review from a Court of Appeals decision filed June 21, 2002. This petition was being held pending a decision in the *Thorell* case. On September 30, 2003, the petition for review was granted by the Supreme Court and then immediately remanded to the Court of Appeals on the authority of *Thorell.* The Judicial

[8] Declaration of Shirley Batten, p. 2-3: "During the meetings, we reviewed certain documents and discussed why, in each instance, a document was not subject to production based on an exemption under the PDA. For instance, when a document was potentially subject to the 'controversy' exemption, RCW 42.17.310(j), the employees familiar with the document's creation would identify the reasonably-anticipated or pending lawsuit and the relationship between that controversy and the document. The various 'controversies' included, among others, several pending cases involving persons detained at the McNeil Island Special Commitment Center ("SCC") and Justice Sanders' declaratory action against the State in which he sought a publicly-funded defense in the disciplinary proceedings brought by the commission on Judicial Conduct ("CJC")."

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Conduct Commission found that Justice Sanders had accepted documents from Mr. Spink at the time of the visit to the SCC.

- *Sanders v State of Washington*, Thurston County No. 04-2-00699-3. This litigation was initiated on April 12, 2004, following the complaint to the CJC filed March 19, 2003.

I find that litigation in the first two cases was ongoing when all of the withheld records were generated and when the PDA request was made and exemption claimed. I find that litigation in the third case was ongoing when the PDA request was made and exemption claimed. Further, I find that anticipated litigation in the third case was reasonable at the of the CJC complaint on March 13, 2003. Anticipation of such litigation was reasonable based upon the history of a similar suit arising from an earlier CJC complaint against Justice Sanders.[9]

I conclude that each of the three items was a controversy within the meaning of 310(1)(j). Accordingly, for *in camera* examination of each record where 310(1)(j) is asserted as a basis for exemption from production, the first test must be whether the record is relevant to one of the three controversies. That determination is made separately for each record, *in camera.*

If the record is determined to be relevant to one of the three controversies, the court must then determine whether the record is entitled to the protection of the work product doctrine, again *in camera.*

Standards for the Work Product Doctrine

The work product doctrine is a common law doctrine codified in CR 26(b)(4). It provides, in relevant part:

> [A] party may obtain discovery of documents . . . prepared in anticipation of litigation or for trial by or for another party . . . 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.

[9] In contrast to what the State seems to imply in its Reply Brief, page 14 ("At the time of the communications at issue, the State reasonably anticipated . . "), the language of §.310(1)(j) seems to provide for application of the test at the time of the PDA request, not the time when the record was created. This court need not decide that issue, for in camera examination reveals that each record examined was created after the date when at least one of the three controversies started.

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By the terms of this court rule, a party may obtain discovery of materials prepared in anticipation of litigation only if that party can show substantial need and an inability to obtain the information elsewhere. Even if such showing has been made, a court is directed to protect from disclosure the categories listed in the last sentence of the rule.

The PDA is a strongly worded mandate for broad disclosure of public records. *Hearst v. Hoppe*, 90 Wn.2d 123, 127 (1978). The provisions of the PDA are to be construed broadly, and its exceptions narrowly. Nevertheless, the PDA does not require that the work product doctrine be construed or applied differently than it would be in litigation discovery under the civil rules. *Soter v. Cowles Publishing Co.*, 131 Wn. App. 882, ¶18 (2006) (work product under the Public Disclosure Act is the same as work product under the civil rules.)[10] This principle is further acknowledged in the Washington Supreme Court's discussion of the work product doctrine in *Limstrom v. Ladenburg*, 136 Wn. 2d 595, 609-612 (1998).

The standards for determining second test of §.310(1)(j), application of the work product rule, during *in camera* examination are:

- There are two categories of work product: (1) factual information; and (2) attorneys' mental impressions, research, legal theories, opinions, and conclusions.
- Correspondence and notes of discussions with others created or gathered during preparation for litigation are included with mental impressions in the opinion work product category.
- A court may allow an adverse party to discover factual information gathered by an attorney upon a showing of substantial need for the information in preparing the party's case and an inability to obtain the substantial equivalent without undue hardship.
- Attorneys' mental impressions, research, legal theories, opinions, and conclusions enjoy nearly absolute immunity. A court may release this work product only in very rare and extraordinary circumstances.
- Work product documents need not be prepared personally by an attorney; they can be prepared by or for the party or the party's representative, so long as they are prepared in anticipation of litigation.

Soter v Cowles Publishing Co., 131 Wn. App. 882, ¶17-¶22 (2006). In *Soter*, the Court of Appeals declared:

[10] One important exception to this general principal is that the party seeking disclosure under the PDA does not have to show substantial need. Need or purpose in seeking disclosure is never an issue and the burden of proof never shifts from the agency.

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> The attorney work product doctrine . . . is intended "to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." Citing *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir.1998) (quoting *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S.Ct. 385, 91 L.Ed. 451 (1947)).

Soter, at ¶17.

There is little dispute, if any, about the standards for applying the attorney-client privilege; although there is substantial dispute about the application of the privilege as to most of these records. The language of RCW 5.60.060(2)(a) provides:

> An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

Neither the language of the statute nor case law construing the privilege limits the privilege to communications between an attorney and client, or between two attorneys serving the same client, that convey legal advice. Once an attorney-client relationship exists, any communication arising from that relationship is privileged, unless waived or controlled by a recognized exception to the privilege.

I conclude that the common interest doctrine is recognized in Washington and is properly applied to many of the communications between the AGO and members of the King County and Snohomish County prosecuting attorney offices. Justice Sanders is correct in arguing that the doctrine only applies to PDA exemptions when there is an underlying exemption recognized in the PDA. I have applied that standard here.

With the foregoing principles in mind, I have undertaken *in camera* review of the 115 records submitted. I directed the AGO to provide the court and Justice Sanders with an expanded explanation of the claim for exemption as to each record; and I permitted Justice Sanders to respond in the same document. From that document I have created *Appendix A – Claims for Exemption, Notes of the Parties and Court's Decisions*, which includes the AGO's explanations, Justice Sanders' response, and my decision. The appendix is attached and made part of this *Court's Opinion*. The AGO's claim for exemption has been sustained for all but seven of the records. The claims for exemption of Documents #30, #32, and #94 are denied. The claims for exemption of Documents #72 and #115 are partially denied. The claims for exemption of Documents #103 and

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#104 are denied, but they are duplicates of #94 and #30 respectively. For purposes of considering the penalties, if any, that should be assessed against the AGO pursuant to RCW 42.17.340(4), there are five records ordered to be produced.

I have also undertaken examination of the 33 records submitted to me as the *Supplemental Production Notebook* in a manner akin to *in camera* examination. I have stated my decisions on these records in *Appendix B – Court's Decisions*, which is attached and made part of this *Court's Opinion*. The AGO's initial claim for exemption has been sustained for all but three of the records. The claims for exemption of Documents #3 (partial denial), #32, and #57 are denied. Document #32 is part of *in camera* review Document #72, and the two should be considered as one record for purposes of §.340(4).

All issues of costs, fees, and penalties under RCW 42.17.340(4) have been reserved for later. Justice Sanders may initiate that process by motion.

DATED: January 12, 2007, as amended July 27, 2007.

Wm. Thomas McPhee, Judge

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0-000001725

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APPENDIX IV

FILED
SUPERIOR COURT
THURSTON COUNTY WA
2007 JUL 30 AM 9:21
BETTY J. GOULD, CLERK
BY 3
DEPUTY

SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

THE HONORABLE RICHARD SANDERS,

Plaintiff(s),

v.

STATE OF WASHINGTON,

Defendant(s).

NO. 05-2-01439-1

COURT'S OPINION ON MOTION FOR PARTIAL RECONSIDERATON

I address first my ruling on the three specific documents challenged in the AGO's motion. I modify my ruling for each of the three, as explained:

Document #32. I modify slightly my initial decision regarding the redacted portion of the email string. I affirm my denial of the redacted portion of the email string except that portion of the second sentence that begins with the word "but" and extends to the end of that sentence. Those ten words may be redacted from the email that must be produced. The decision made here is consistent with my determination throughout this *in camera* process to distinguish between documents relating to the three identified cases being considered by the Supreme Court (and Justice Sanders' possible recusal therefrom) and documents relating to a complaint against Justice Sanders for violation of the Code of Judicial Conduct.

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Document # 72. I modify slightly my initial decision denying the claim of exemption for pages three through nine. I affirm denial of the claim of exemption except the last sentence of page nine. This last sentence may be redacted from the material that must be produced. The decision made here is consistent with my determination throughout this *in camera* process to distinguish between documents relating to the three identified cases being considered by the Supreme Court (and Justice Sanders' possible recusal therefrom) and documents relating to a complaint against Justice Sanders for violation of the Code of Judicial Conduct.

Document #115. I reverse my denial of exemption for the first nine lines of this document. It is exempt because of the attorney-client privilege. AGO's counsel appears to be correct in asserting that I overlooked this ground in my consideration of the document.

The second part of the AGO's motion challenges my conclusion that, "the remedy for the AGO's violation of §.310(4) is consideration of costs, attorneys fees, and penalties pursuant to RCW 42.17.340(4)." I deny the motion; and observe that it is based upon a far more expansive reading of that language than was intended by this court. The sentence needs to be read in context. It concludes three paragraphs where my opinion addressed two remedies urged by Justice Sanders: "that he is entitled to production of all records by reason of the AGO's failure to provide the required brief explanation . . ." and "that the AGO is precluded from offering any explanation for the claimed exemption other than the one offered at the time of initial disclosure." *Court's Opinion*, p 7. Justice Sanders' argument was rejected in the paragraph containing the sentence challenged here:

> I am not persuaded by this argument. I conclude that the AGO's violation of the brief explanation requirement in §.310(4) does not entitle Justice Sanders to production of otherwise exempt public records and does not preclude this court from requesting an explanation for consideration during *in camera* examination. I conclude that the remedy for the AGO's violation of §.310(4)[1] is consideration of costs, attorneys fees, and penalties pursuant to RCW 42.17.340(4). [Emphasis added here.]

[1] The violation of §.310(4) applies only to those exemptions asserted under §.310(1), not exemptions asserted under a different statute – e.g., RCW 50.60.060(2).

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0-000001631

I emphasize the word "consideration" in the challenged sentence because it was a conscious and careful choice of language at the time. I wished to emphasize that no remedy had been decided, except rejection of the two discussed in the preceding paragraphs. The remedies of costs, attorneys fees, and penalties pursuant to RCW 42.17.340(4) had been pled and were certainly on the table, but they had not been briefed or argued in light of my rulings concerning the alleged violations of the Public Disclosure Act. I concluded my opinion by declaring that, "All issues of costs, fees, and penalties under RCW 42.17.340(4) have been reserved for later. Justice Sanders may initiate that process by motion." *Court's Opinion*, p 14. I exercised great caution in my choice of language in part because I anticipated all of the arguments the AGO now makes in its motion for reconsideration. Those arguments should await the motion by Justice Sanders.

In preparing this opinion I re-read my *Court's Opinion* and noticed that my reference to §.310(1)(j) at page 7, line 5, should have been to §.310(4). Also, I wished I had placed quotation marks around several phrases from statutes that I quoted in the opinion. If the litigants have no objections, I will file an amended opinion containing those changes.

Finally, in the manner of fine print at the end of a contract, I close with my explanation of our local rule on motions for reconsideration, LCR 59(a)(3), that I offer every time the rule is cited to me. This provision does not create a new or different standard for motions for reconsideration. It is a copy of the rule from the U.S. District Court for the Western District of Washington, and is designed to provide some cautionary guidance to self-represented parties who sometimes appear to conclude that every ruling requires a motion for reconsideration.

DATED: July 27, 2007.

Wm. Thomas McPhee, Judge

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0-000001632

APPENDIX V

27

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
07 DEC 21 AM 11:46
BETTY J. GOULD, CLERK
BY _____ DEPUTY

HONORABLE Wm. THOMAS MCPHEE

☐ EXPEDITE
☐ No hearing set
☐ Hearing is set
Date: _____
Time: _____
Judge/Calendar Wm. Thomas McPhee

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

HONORABLE RICHARD B. SANDERS, an individual,

Plaintiff,

vs.

THE STATE OF WASHINGTON

Defendant

Case No. 05-2-01439-1

ORDER ON PLAINTIFF'S MOTION FOR PENALTIES, ATTORNEY'S FEES AND COSTS

This matter under the Public Disclosure Act, RCW 42.17 ("PDA"), came before the Court on Plaintiff's Motion for Penalties, Attorney's Fees and Costs ("Plaintiff's Motion"). The Court considered the pleadings listed below and the parties' oral argument on September 21, 2007. The Court hereby incorporates by reference its Opinion dated January 12, 2007, the Court's Opinion on Motion for Partial Reconsideration dated July 27, 2007, and its Oral Opinion dated September 21, 2007 (transcript attached).

The pleadings considered on Plaintiff's Motion, in addition to the Opinions referenced above, the oral argument, and the files and records in this case, were:

1) Plaintiff's Motion for Penalties, Attorney's Fees and Costs, with Appendix;

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0-000001844

2) Declaration of Paul J. Lawrence in Support of Motion for Penalties, Attorney's Fees and Costs, with exhibits;

3) State of Washington's Opposition to Justice Sanders' Motion for Award of Fees, Costs, and Penalties, with Appendix;

4) Declaration of Timothy G. Leyh in Support of State of Washington's Opposition to Justice Sanders' Motion for Award of Fees, Costs, and Penalties, with exhibits;

5) Plaintiff's Reply in Support of Motion for Penalties, Attorney's Fees, and Costs;

6) Supplemental Declaration of Paul J. Lawrence in Support of Motion for Penalties, Attorney's Fees, and Costs;

7) The State of Washington's Supplemental Timeline Exhibit; and

8) The Declaration of Matthew J. Segal in Support of Penalties, Attorney's Fees and Costs, with exhibits.

Plaintiff's Motion for Penalties, Attorney's Fees and Costs is GRANTED IN PART AND DENIED IN PART as stated in the attached transcript of the Court's September 21, 2007 Oral Opinion, and as summarized in this Order.

In his Motion, Justice Sanders requested approximately $806,018 in attorney's fees, costs, and penalties under the PDA: $191,348 for his attorney's fees and costs (including a lodestar multiplier), and $614,670 in statutory penalties. After consideration of the parties' briefing and argument, the applicable legal standards, and the documentation provided, the Court has determined that Justice Sanders is entitled to $55,443.12 in attorney fees and costs[1] (with no lodestar multiplier) and $18,112 in statutory penalties.

[1] This sum is comprised of $47,984 in fees and costs that the Court ordered in its Oral Opinion on September 21, 2007, and an additional $7,459.12 relating to fees and costs incurred subsequent to Justice Sanders' briefing. The Court had arrived at the $47,984 figure by multiplying $127,955, *i.e.*, the claimed fees and costs without a lodestar multiplier, by approximately 37.5 percent. Following oral argument on Plaintiff's Motion, Justice Sanders' attorney stated that Justice Sanders had incurred an additional $19,891.05 in fees and costs after and during the filing of the motion papers and through the motion hearing. The parties have agreed that application of the Court's formula to the additional fees and costs would yield an additional award of $7,459.12 ($19,891. x 37.5 percent), to which Justice Sanders is entitled.

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Each party prevailed on some aspects of this case. On balance, the measure of success tips overwhelmingly in favor of the Attorney-General's Office ("AGO"). While Justice Sanders obtained an order directing production of six documents out of the 148 documents at issue, the AGO prevailed on 94 percent of its claims of exemption. Justice Sanders prevailed on his argument that the AGO violated the "brief explanation" requirement of RCW 42.17.310(4), but as stated in the Oral Opinion, that matter was never at issue; the issue was the remedy available for violation of the "brief explanation" requirement. The AGO prevailed on the remedy issue. Justice Sanders sought a declaration that the remedy was either production of each record withheld without the brief explanation, or an order precluding the AGO from supplementing its exemption log to include a brief explanation of its claim of exemption. Neither remedy is available to Justice Sanders under the law, and both are denied.

The AGO also prevailed on the issue of whether it made a legally sufficient search of public records in response to Justice Sanders' PDA request, and whether the AGO's supplemental production of records that the AGO had earlier claimed were exempt, was an *ipso facto* compelled disclosure of wrongfully-withheld documents, entitling Justice Sanders to penalties under RCW 42.17.340(4). The Court holds that the AGO made a legally sufficient search, and that the supplemental production was not a compelled disclosure entitling Justice Sanders to penalties.

Despite the fact that the AGO prevailed on most of the issues in this case, the language of RCW 42.17.340(4) requires an award of reasonable attorney's fees and costs and some statutory penalty under the circumstances of this case. The AGO does not contest the reasonableness of the fees and costs incurred by Justice Sanders' counsel. Having found that Justice Sanders is, to some extent, a prevailing party, the Court has no discretion but to award some fees and costs. The Court, however, has discretion to allocate fees and costs among successful and unsuccessful claims, which it does here. *Tacoma Public Library v. Woessner*,

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0-000001846

90 Wn. App. 205 (1998); *Linstrom v. Ladenburg*, 136 Wn.2d 595 (1998). The reasoning underlying the Court's Order on fees and costs, including the relative weight assigned to different issues on which the respective parties prevailed, is fully stated in the Oral Opinion attached hereto.

With regard to penalties, as stated in the Oral Opinion, the Court holds that there were two records at issue, relating to two different proceedings within the overarching controversy: 1) Justice Sanders' PDA request, and 2) the judicial conduct complaint against Justice Sanders and the subsequent investigation. The next issue is whether the Court should omit, from the per diem penalty, the number of days that this matter was pending due to circumstances beyond the AGO's control. Under *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 438 (2004), the Court lacks discretion to do so. Thus, the total days to be included in the penalty calculation is 1,132 days.

The final issue is the appropriate penalty rate. The Court has determined that a minimal penalty is required, due to the AGO's good faith throughout the PDA process here, and other factors. The AGO consistently made the same claims of exemption throughout these proceedings. After Justice Sanders filed this PDA action, the AGO immediately contracted with an independent law firm to conduct a full review of claimed exemptions. As a result, the AGO produced 33 additional documents—documents that the Court nonetheless reviewed, and on which the Court has sustained claims of exemption for 30 documents. The AGO prevailed on the vast majority of its claims of exemptions. Given these considerations, the Court concludes that a minimal $5-per-day penalty is required, plus $3 per day for the AGO's violation of the "brief explanation" requirement of RCW 42.17.310(4). Multiplying 1,132 days by 2 records by $8 per day results in a total penalty assessment of $18,112.

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In sum, as stated above and in the Court's September 21, 2007 Oral Opinion, the Court GRANTS IN PART AND DENIES IN PART Plaintiff's Motion for Penalties, Attorney's Fees and Costs. The Court HEREBY ORDERS the State of Washington to pay Plaintiff $55,443.12 in attorney fees and costs in connection with his PDA request, and $18,112 in penalties.

DATED this 20th day of December, 2007.

HONORABLE Wm. THOMAS McPHEE

Presented by:

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By_____
Timothy G. Leyh, WSBA #14853
Katherine Kennedy, WSBA #15117
Special Assistant Attorney General for
Defendant State of Washington

KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP

By_____
Paul J. Lawrence, WSBA #13557
Matthew J. Segal, WSBA #29797
Attorneys for Plaintiff Justice Richard Sanders

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0-000001848

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

THE HONORABLE RICHARD B. SANDERS, Plaintiff, vs. THE STATE OF WASHINGTON, Defendant.	No. 05-2-01439-1

ORAL OPINION

BE IT REMEMBERED that on the 21st day of September, 2007, the above-entitled and numbered cause came on for hearing before the Honorable Wm. Thomas McPhee, Judge, Thurston County Superior Court, Olympia, Washington.

Kathryn A. Beehler, CCR No. 2448
Certified Realtime Reporter
Thurston County Superior Court
Family and Juvenile Division
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- and -
Katherine Kennedy
Assistant Attorney General

September 21st, 2007 Olympia, Washington

AFTERNOON SESSION

Department 3 Hon. Wm. Thomas McPhee, Presiding

(Appearances as heretofore noted.)

Kathryn A. Beehler, Official Reporter

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THE COURT: Please be seated. Here is the decision that I have reached in this case: I'm going to begin by repeating a footnote that appears in my amended court's opinion, because this decision may have some public interest, as it addresses public figures and deals with public issues.

There I wrote, and here I repeat,

"Justice Sanders is identified as the person or the party advancing this motion in keeping with the modern court practice that identifies parties by names or unique identifiers rather than the generic designations of 'plaintiff' and 'defendant.' The acts, arguments, and contentions attributed to Justice Sanders were all made by his attorneys acting in his behalf. The same can be said for the Attorney General or the Attorney General's Office."

The motion comes before me today pursuant

to RCW 42.17.340(4), a statute that contains two parts. In part one, the statute directs that, "Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable time shall be awarded all costs, including reasonable attorney's fees incurred in connection with such legal action."

Part two of the statute addresses penalties. It states, "In addition, it shall be within the discretion of the court to award such person an amount not less than $5 and not to exceed $100 for each day that he or she was denied the right to inspect or copy said public record."

In addressing my decision today, I begin with some of the conclusions that I have previously announced in my Amended Court's Opinion. These conclusions relate directly to the issues that I am to decide today. They include, "I conclude that the AGO made a legally sufficient search for public records in response to Mr. Bulmer's request and that its disclosure complied with the PDA." (Page 3)

Next, "I conclude that the part of

RCW 42.17.310(4) requiring a statement of specific exemption has been adequately satisfied." (Page 6)

Next, "I conclude that the part of Section .310(4) requiring a brief explanation of how the exemption applies to the record has not been satisfied." (Page 7)

Next, "The PDA does not provide a specific consequence for failure to provide the required brief explanation. Significantly, the PDA does not compel production of public records otherwise exempt from production under Section .310(1) because of an agency's failure to comply with the brief explanation requirement of Section .310(4) or any other provision of the PDA. No provision of the PDA or judicial construction thereof causes an exempt public record to lose its exemption by reason of agency action or inaction in response to a request for inspection. Instead, the PDA provides recourse to the courts for the requesting party, places the burden of proof on the agency, and permits very significant penalties to be imposed against any agency that wrongfully withholds production of a public record." That is also at page 7.

Finally, "I conclude that the AGO's

violation of the 'brief explanation requirement' of Section .310(4) does not entitle Justice Sanders to production of otherwise exempt public records and does not preclude this court from requesting an explanation for consideration during in camera examination. I conclude that the remedy for the AGO's violation of Section .310(4) is consideration of costs, attorney's fees, and penalties pursuant to RCW 42.17.340(4)." (Page 8)

With those conclusions in mind, I address the issues as they are presented to me in this motion.

First as to the issue of prevailing party status. Justice Sanders contends that he is the prevailing party in two respects. First, Justice Sanders contends that he obtained an order directing production of one or more records claimed exempt by the AGO. He is correct in this contention. However, countervailing this contention is the fact that production was ordered for only six documents. I accept and adopt the AGO's accounting for that number.

The AGO claims it prevailed on 94 percent of its claims of exemption. I agree. After removing the duplicates from the calculation, the

AGO prevailed on nearly 96 percent of its claims.

Second, Justice Sanders contends he obtained my judgment that the AGO violated the Public Disclosure Act Section .310(4) which requires a brief explanation of how the exemption applies to the record withheld. Justice Sanders is correct in this contention, but that judgment was never at issue. It was obvious by even the most cursory examination of the initial Entire Document Index. The contested issue was about the remedy available to Justice Sanders for this violation.

Justice Sanders sought, first, a declaration that the violation required production of each record withheld without the required brief explanation. Second, he sought a declaration that the AGO should be precluded from supplementing the privilege log to include a full explanation of its claim of exemption. This second remedy was really a restatement of the first, because without the opportunity to supplement, the AGO would have been unable to prove the merit of its exemption claims for all or nearly all of the records. I concluded that neither remedy is available under the law, and so both were denied to Justice Sanders. The

AGO prevailed on the issue of remedies.

In addition to the two issues identified above, two additional important issues were decided in this case. First, whether the AGO made a legally sufficient search of public records in response to Justice Sanders' PDA request. Nearly four pages of my 14-page Amended Court's Opinion addressed this issue. I concluded that the AGO's search was legally sufficient. The AGO prevailed on this issue.

The second issue was whether the AGO's subsequent production of records earlier claimed exempt was ipso facto a compelled disclosure of wrongfully held records entitling Justice Sanders to penalties under Section .340(4). I concluded that it was not, and instead conducted a review of those records to determine if each claim of exemption was valid even though the record had been earlier produced. The AGO prevailed on this issue.

I conclude that both parties prevailed on some aspects of this case. On balance, the measure of success tips overwhelmingly in favor of the AGO. Nevertheless, the language of Section .340(4) provides in relevant part, "Any

person who prevails against an agency in any action in courts seeking the right to inspect or copy any public record shall be awarded all costs, including reasonable attorney's fees incurred in connection with such action."

I focus on the two phrases in that statute, first, "any person who prevails," and second, "shall be awarded." Following well-established legal precedent, I conclude that Justice Sanders is a person who prevails under the statute and therefore shall be awarded costs and fees. Having found that he is a prevailing party, there is no discretion in the decision to award some costs and some fees.

Following equally well established precedent, I conclude that a trial court does have discretion to allocate attorney fees and costs between successful and unsuccessful claims and award fees only on successful claims where, as here, the claimant prevails on some claims and fails on others. This precise issue was decided by our Court of Appeals Division 2 in *Tacoma Public Library v. Woessner*, 90 Wn. App. 205 (1998), and by our Supreme Court in *Limstrom v. Ladenburg*, 136 Wn. 2d 595, also a 1998 case.

The matter to be decided here is what amount of costs and fees should be awarded to Justice Sanders' attorneys. The claim for costs is $1,170. The claim for attorney's fees is $126,785 based on a rate times hours calculation. The total is $127,955. The attorney contract is for a contingent fee based apparently on the amount of penalties recovered. The contingent fee calculation will be substantially less than the rate times hours calculation. Nevertheless, under well established precedent, the appropriate calculation for award of attorney's fees pursuant to statute is the lodestar calculation of hours times rate. Justice Sanders contends a lodestar multiplier is appropriate here based on the uncertain nature of a contingency contract. I have considered that request and reject it. The nature of the recovery here does not justify a multiplier beyond hours times rate.

My task in awarding costs and attorney's fees is to allocate among successful and unsuccessful claims. I have identified four major issues in this case. Justice Sanders prevailed on only one of those issues, and there only a small part of it. I have not given the four major

issues equal weight.

The issue of the remedy for noncompliance with the "brief explanation" requirement was assigned the least weight. As noted, the noncompliance was obvious. The first remedy sought, production of each record withheld without the required brief explanation, was rejected based upon a plain reading of the statute.

The second remedy, a prohibition against supplemental explanation, was rejected on the strength of the very clear Supreme Court precedent from *Progressive Animal Welfare Society v. The University of Washington,* 125 Wn. 2d 243 at 253 (1994). Neither result required more than a basic reading of clear law. I assigned 10 percent of weight to this issue.

I assigned 20 percent to each of the next two issues: The "sufficiency of the search" issue and the "effect of subsequent voluntary production of records" issue. The result in neither issue was compelled by statutory language or established precedent. The sufficiency of search issue was not a difficult legal issue but was very fact specific. While the result in the subsequent production issue was not compelled by statute or

precedent, the decision was the result of well established public policies attendant to the PDA and discussed in my Amended Court's Opinion.

I assign 50 percent of the weight to wrongful withholding. This issue clearly required most of the effort by all lawyers and certainly the court. 50 percent of the total costs and fees claimed is $63,978. Justice Sanders only prevailed on about 5 percent of this issue, and the AGO prevailed on the rest. Nevertheless, I am of the firm conviction that a simple pro rata allocation of fees based on that formula is not appropriate here for two reasons:

First, it is not reasonable to conclude that the effort challenging the last claim of exemption was the same as for the first. There are significant economies of scale that make pro rata allocation unfair.

Second, the AGO's failure to provide a brief explanation in its entire document index almost certainly caused some extra work by Justice Sanders' attorney, though given the lack of inquiry during the intervening year between the claims of exemption and the filing of the lawsuit and the fact that the claim for attorney's fees

begins only two days before the complaint was filed, this was not as dramatic an impact as claimed.

In the exercise of my discretion, and based upon this analysis, I award 75 percent of the amount allocated to this issue or $47,984 for costs and attorney's fees.

I now address the second part of section .340(4), the language that states, "In addition, it shall be within the discretion of the court to award such person an amount of not less than $5 and not to exceed $100 for each day that he or she was denied the right to inspect or copy said public record."

I deal first with the number of records, and I apply the criteria identified in the case of *Yousoufian v. The Office of Ron Sims, 152 Wn. 2d 421 (2004)*. Here in this case I find that all of the records involve the same broad controversy, the consequences arising out of Justice Sanders' visit to the Special Commitment Center. All involve a narrow range of claimed exemptions, Section .310(1)(j). There were other exemptions claimed by the AGO that were upheld, but of the documents where disclosure was compelled after

withholding, I could find only the single claim of exemption at issue. Further, all records were generated in the same time encompassed by the broad controversy. And finally, all records were disclosed pursuant to a single PDA request from Justice Sanders.

Nevertheless, the Public Disclosure Act is to be broadly construed in order to promote full disclosure of government activities. With that principle in mind, I conclude that there were two records here, because they relate to different proceedings within the overarching controversy. Documents 30 and 104 are the same memo relating to Justice Sanders' PDA request. They are one record for purposes of Section .340(4). The other documents, including the supplemental production documents, all relate to the judicial conduct complaint against Justice Sanders and the subsequent investigation. They are one record for the purposes of Section .340(4). There are two records here.

Law does not permit me to stay the counting of days required by Section .340 (4). As stated in the *Yousoufian v. Office of Ron Sims* at page 438, "Although the Court of Appeals

determined here and in Doe 1 that agencies should not pay for delays that plaintiff could have limited, the PDA does not grant such discretion."

I'm also guided somewhat by what I understand to be the legislative history of this statute. At the time of *Yousoufian*, the statute of limitations for bringing these actions was five years. After *Yousoufian*, in the next Legislature, I believe, the law was amended and the statute of limitations for bringing an action for failing to disclose documents under the PDA became one year. It became effective on July 23, 2005.

It seems as though there is a connection between the two. The Legislature obviously had *Yousoufian* this law before it, and it moved to reduce the possibility of delay prior to filing of the lawsuit. The Legislature could have addressed other areas of delay within the lawsuit occurring after filing. It chose not to do so.

I see the amendment of the law as being essentially a legislative decision to address the issue that arose in *Yousoufian* and to go no further than the ruling in *Yousoufian*, that the delay prior to filing could not be stayed or excluded from the counting of delays for purposes

of calculating penalties.

There have been delays in this case. I bristle internally when the time taken by this court is counted as time with the case under advisement. I use the term "under advisement" when I am called upon to decide something after all of the material has been submitted to me. I consider an in camera project such as this to be quite a different matter. It is much more akin to a significant civil bench trial. It takes a significant block of time - here several weeks - and this is not the type of case that can be done piecemeal in the evenings or on weekends. It must be fit within an existing schedule that the court has where clearly the responsibility to address this case is not as much a priority as the responsibility of this court to address criminal cases which have priority, and other civil cases that have been waiting, sometimes longer than this case waited, for resolution by trial and which are scheduled long before matters come to the court for in camera inspection.

I understand the Legislature's desire to move these matters forward and believe that the process we have in place is in the most part

effective. When cases are very large, such as this case, and contain many complex legal issues, it is difficult to accomplish the work necessary to reach a decision in what would otherwise be a timely manner.

I adopt the timeline contained in the AGO's presentation to me today where total days from the first disclosure and withholding of records to the time of production of the previously disclosed records is counted as being 1,132 days. If that is incorrect, of course, I will change my calculations. I believe it is correct, however.

Having decided there were two records and 1,132 days, the next step in this process is to determine the penalty rate. None of the arguments offered by Justice Sanders for a very high rate are supported by the evidence before this court. There is no pattern of shifting claims of exemption here. Only one claim of exemption was made on all of the records that were ordered to be produced after wrongful withholding. That was Section .310(1)(j); the claim for exemption on those records was consistent from beginning to end.

Second, the AGO prevailed in the vast

majority of its claims of exemption. Where production has been ordered by this court, the issue presented has been complex and the decision a close decision. It hinged on how broadly I interpreted the, "relevant to a controversy" requirement under Section .310(1)(j). Every record ordered to be produced was tied in some manner to the litigation that did qualify as relevant to a controversy. I determined that the connection was too remote for the records I ordered produced, but it was a close question.

Finally in this respect, I find that the AGO acted in good faith throughout this process. The record here is that it made a timely disclosure initially and that the disclosure was at least as broad, perhaps broader than the disclosure requested by Justice Sanders, because it also conformed to the request for disclosure made by the BIAW.

Next, when Justice Sanders first responded to the production of documents, he did so by filing a lawsuit against the AGO. The AGO immediately contracted with an independent law firm to conduct a full examination of the exemptions that it had claimed. These exemptions

were reviewed, and at the end of the process, no exemption was changed. However, the AGO did produce 33 additional documents, additional records, that it concluded could be produced even though it maintained its right to claim exemption for those documents.

I sustained that claim of exemption on 30 of the 33 documents.

Applying the analysis of well established precedent, including *Yousoufian*, I conclude that a minimal penalty is appropriate here - $5 per day is justified - except I determined that the AGO had not complied with the brief explanation requirement of Section .310(4). I find this noncompliance had minimal impact on the case. No inquiry was made, and no contact was had at all until the case was filed. As noted, when it was filed, the AGO undertook an independent reexamination. The new privilege log generated at that time still did not contain a column entitled "brief explanation," but it did contain a new column entitled "document description" that for many of the records is sufficient as a brief explanation. Nevertheless, this failure to comply justifies an additional amount of penalty. I

determine this to be $3 per day for each of the two records for a total penalty of $8 per day.

1,132 days times $8 times two records is $18,112. That is the amount of penalty I assess in this case. I especially considered the contention by Justice Sanders that records 30 and 104, the two records that comprise the first group identified above, compel a much higher penalty. I disagree with that contention. A close reading of the memo is that Mr. Blonien opined that the CJC-related records were not eligible for exemption under Section .310(1)(j), but he did opine that they were exempt under Section .310(1)(i). That contention was not accepted by his superiors.

The Attorney General's Office decided to claim exemption under Section .310(1)(j). The memo is evidence of a deliberative process, a responsible undertaking to determine the appropriate way to proceed here. It is not evidence of some malice or negligence or other factor that would justify a higher penalty. I also note that it affected only three records, if you consider that record No. 94 and 103 are essentially duplicates.

Counsel, that is my decision in this case.

MR. LAWRENCE: There's one issue that -- we may be able to resolve it. There were an additional $15,000 of fees incurred since the billing related to this motion. We have proposed to the State to apply the same formula to that, and we will wait back from the hearing. But if there's not an agreement of that, we may need to seek that before your court. But I think we can get agreement.

THE COURT: Mr. Leyh?

MR. LEYH: I expect we will be able to agree to that, Your Honor, and I'll get back to Mr. Lawrence early next week. I just need to check with my client.

THE COURT: All right. It seems like a reasonable way to proceed.

MR. LEYH: Right.

THE COURT: That will be all for today. I'll set this matter for presentation, because our policies require that, but I will expect that you will be able to prepare some sort of order and present it to me --

MR. LEYH: All right.

THE COURT: -- less formally than that.

MR. LEYH: We will take the responsibility of doing the first shot of that, and we'll give it to Mr. Lawrence for review.

THE COURT: My next motion day is when? What is today? It would be October 9 at the 9:00.

MR. LEYH: 9:00?

THE COURT: Yes.

MR. LEYH: If it's an agreed order, is it necessary for us to appear?

THE COURT: I would not expect you to be here. No. You just present it.

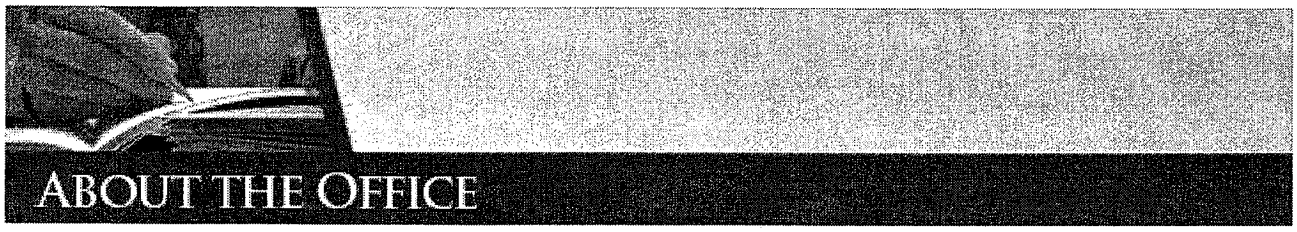
MR. LAWRENCE: Thank you, Your Honor.

THE COURT: Thank you, Counsel. We'll stand in recess.

(Conclusion of September 21, 2007, Proceedings.)

APPENDIX VI

About the Office



The Attorney General is the top legal officer for state government, elected by the public for a four-year term.

Attorney General Rob McKenna is Washington's 17th state Attorney General. He was sworn into office in January 2005 and is serving his first term.

The Attorney General's Office (AGO) touches the lives of people all across Washington. As chief legal officer, the Attorney General leads a team of attorneys who represent state clients and the public interest as directed under state law.

AGO Mission Statement

As an independent constitutional office, and legal counsel to state government, we serve the citizens of Washington with the highest standards of excellence, ethics and effectiveness.

Download the AGO Brochure (PDF)

AGO Quick Facts

- The AGO serves more than 230 state agencies, boards, commissions, colleges, and universities, as well as the Governor and Legislature.
- The Attorney General manages the largest public law office in the state with more than 1,200 employees and offices in 12 cities around the state: Bellingham, Port Angeles, Everett, Seattle, Tacoma, Olympia, Wenatchee, Spokane, Yakima, Kennewick, Vancouver and Pullman.

More Topics

What the Office Does | Divisions | Office Locations | History of the Attorney General's Office | Careers | Contact Us

Open Government

Attorney General Rob McKenna believes access to open government is vitally important in a free society. That's why he's made government accountability, open records and access one of the top priorities in his administration. Since Washington voters approved the Public Disclosure Act more than 30 years ago, state and local governments have been claiming a growing number of exemptions to public records laws.

As a result, citizens have faced increasing obstacles and frustration in their efforts to gain access to government and information. Strong "sunshine laws" are crucial to assuring government accountability and transparency.

Open Government Ombudsman

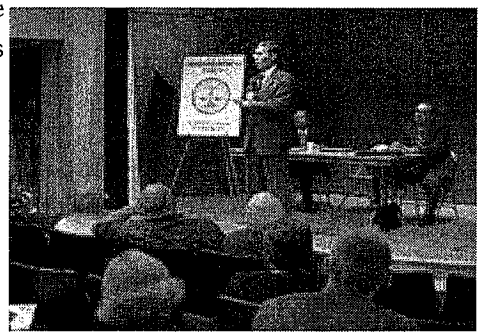
To assist in promoting public access to government, Attorney General McKenna created a new position in the Attorney General's Office called Open Government Omdudsman. Assistant Attorney General Tim Ford, the AGO Open Government Ombudsman, works with other assistant attorneys general as they advise their clients and coordinates with and offers training to local government on open government issues.

Open Government Internet Manual

The Attorney General's Open Government Internet Manual was produced by the Attorney General's Office with the assistance of Allied Daily Newspapers of Washington and local and state government organizations. The deskbook is a comprehensive, easy-to-read overview intended to help clarify provisions of the law and hopefully prevent future disagreements. This Internet Manual provides a general summary and is not intended to provide a complete discussion of every detail of the Public Records Act or Open Public Meetings Act.

Public Records Brochures

Obtaining Public Records (pdf)
Denials of Public Records (pdf)



Attorney General McKenna on the Open Government Tour in Spokane.

SUNSHINE WEEK
YOUR RIGHT TO KNOW

March 16-22, 2008 was Sunshine Week! Read Attorney General Rob McKenna's editorials:

OPINION:"Sunshine makes government stronger, more accountable" (The Olympian)

2006 Model Rules (Paper Records)

The model rules, designed to reduce litigation and assist smaller local governments and citizen requestors by allowing them to avoid "re-inventing the wheel" on recurring issues, have been adopted and published in the Washington Administrative Code.

2007 Model Rules (Electronic Records)

The Legislature directed the Attorney General to adopt advisory model rules on topics including "Fulfilling requests for electronic records." The model rules are non-binding best practices to assist records requestors and agencies. On June 15, 2007, the Attorney General's Office adopted the model rules for electronic records.

Public Records Tour

AG McKenna hosted a series of forums across the state in the summer and fall of 2005, in an effort to increase citizen involvement in government and gather input for the 2006 model rules.

He visited 13 cities around the state and heard from local, county and state officials, members of the media and numerous citizen activists.

2005 Legislation

Shortly after taking office in 2005, Attorney General McKenna proposed, and the Legislature and Governor approved, legislation to strengthen the Public Disclosure Act (HB 1758).

The new public disclosure law:

- Balances the public's right to access information with tools that assist governments with complying in a cost-effective manner
- Prohibits government agencies from denying public records requests simply because they are "overbroad"
- Provides additional compliance tools to government agencies by allowing them to respond to requests on a partial or installment basis
- Helps discourage nuisance requests by allowing agencies to ask for a small copying deposit on each installment of a public records request or to cease fulfilling a request if an installment is

OPINION: Government can be complicated, sunshine shouldn't be (The (Vancouver) Columbian)

OPINION: Sustaining sunshine in a complicated world (Wenatchee World, The (Tacoma) News Tribune, The Linden Tribune)

OPINION: Transparency matters (Yakima-Herald Republic)

OPINION: Wins and losses in the battle for transparency (The Tri-City Herald)

not picked up.

Finally, the law directed the Attorney General to adopt model rules on public records disclosure to assist both records requestors and government agencies.

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APPENDIX VII

RCW 42.56.070
Documents and indexes to be made public.

(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of *subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.

(2) For informational purposes, each agency shall publish and maintain a current list containing every law, other than those listed in this chapter, that the agency believes exempts or prohibits disclosure of specific information or records of the agency. An agency's failure to list an exemption shall not affect the efficacy of any exemption.

(3) Each local agency shall maintain and make available for public inspection and copying a current index providing identifying information as to the following records issued, adopted, or promulgated after January 1, 1973:

(a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(b) Those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by the agency;

(c) Administrative staff manuals and instructions to staff that affect a member of the public;

(d) Planning policies and goals, and interim and final planning decisions;

(e) Factual staff reports and studies, factual consultant's reports and studies, scientific reports and studies, and any other factual information derived from tests, studies, reports, or surveys, whether conducted by public employees or others; and

(f) Correspondence, and materials referred to therein, by and with the agency relating to any regulatory, supervisory, or enforcement responsibilities of the agency, whereby the agency determines, or opines upon, or is asked to determine or opine upon, the rights of the state, the public, a subdivision of state government, or of any private party.

(4) A local agency need not maintain such an index, if to do so would be unduly burdensome, but it shall in that event:

(a) Issue and publish a formal order specifying the reasons why and the extent to which compliance would unduly burden or interfere with agency operations; and

(b) Make available for public inspection and copying all indexes maintained for agency use.

(5) Each state agency shall, by rule, establish and implement a system of indexing for the identification and location of the following records:

(a) All records issued before July 1, 1990, for which the agency has maintained an index;

(b) Final orders entered after June 30, 1990, that are issued in adjudicative proceedings as defined in RCW 34.05.010 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(c) Declaratory orders entered after June 30, 1990, that are issued pursuant to RCW 34.05.240 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(d) Interpretive statements as defined in RCW 34.05.010 that were entered after June 30, 1990; and

(e) Policy statements as defined in RCW 34.05.010 that were entered after June 30, 1990.

Rules establishing systems of indexing shall include, but not be limited to, requirements for the form and content of the index, its location and availability to the public, and the schedule for revising or updating the index. State agencies that have maintained indexes for records issued before July 1, 1990, shall continue to make such indexes available for public inspection and copying. Information in such indexes may be incorporated into indexes prepared pursuant to this subsection. State agencies may satisfy the requirements of this subsection by making available to the public indexes prepared by other parties but actually used by the agency in its operations. State agencies shall make indexes available for public inspection and copying. State agencies may charge a fee to cover the actual costs of providing individual mailed copies of indexes.

(6) A public record may be relied on, used, or cited as precedent by an agency against a party other than an agency and it may be invoked by the agency for any other purpose only if:

(a) It has been indexed in an index available to the public; or

(b) Parties affected have timely notice (actual or constructive) of the terms thereof.

(7) Each agency shall establish, maintain, and make available for public inspection and copying a statement of the actual per page cost or other costs, if any, that it charges for providing photocopies of public records and a statement of the factors and manner used to determine the actual per page cost or other costs, if any.

(a) In determining the actual per page cost for providing photocopies of public records, an agency may include all costs directly incident to copying such public records including the actual cost of the paper and the per page cost for use of agency copying equipment. In determining other actual costs for providing photocopies of public records, an agency may include all costs directly incident to shipping such public records, including the cost of postage or delivery charges and the cost of any container or envelope used.

(b) In determining the actual per page cost or other costs for providing copies of public records, an agency may not include staff salaries, benefits, or other general administrative or overhead charges, unless those costs are directly related to the actual cost of copying the public records. Staff time to copy and mail the requested public records may be included in an agency's costs.

(8) An agency need not calculate the actual per page cost or other costs it charges for providing photocopies of public records if to do so would be unduly burdensome, but in that event: The agency may not charge in excess of fifteen cents per page for photocopies of public records or for the use of agency equipment to photocopy public records and the actual postage or delivery charge and the cost of any container or envelope used to mail the public records to the requestor.

(9) This chapter shall not be construed as giving authority to any agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall not do so unless specifically authorized or directed by law: PROVIDED, HOWEVER, That lists of applicants for professional licenses and of professional licensees shall be made available to those professional associations or educational organizations recognized by their professional licensing or examination board, upon payment of a reasonable charge therefor: PROVIDED FURTHER, That such recognition may be refused only for a good cause pursuant to a hearing under the provisions of chapter 34.05 RCW, the Administrative Procedure Act.

[2005 c 274 § 284; 1997 c 409 § 601. Prior: 1995 c 397 § 11; 1995 c 341 § 1; 1992 c 139 § 3; 1989 c 175 § 36; 1987 c 403 § 3; 1975 1st ex.s. c 294 § 14; 1973 c 1 § 26 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.260.]

Notes:

***Reviser's note:** Subsection (6) of this section was renumbered as subsection (7) by 1992 c 139 § 3; and subsection (7) was subsequently renumbered as subsection (9) by 1995 c 341 § 1.

Part headings -- Severability -- 1997 c 409: See notes following RCW 43.22.051.

Effective date -- 1989 c 175: See note following RCW 34.05.010.

Intent -- Severability -- 1987 c 403: See notes following RCW 42.56.050.

Exemption for registered trade names: RCW 19.80.065.

RCW 42.56.210
Certain personal and other records exempt.

(1) Except for information described in RCW 42.56.230(3)(a) and confidential income data exempted from public inspection pursuant to RCW 84.40.020, the exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought. No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons.

(2) Inspection or copying of any specific records exempt under the provisions of this chapter may be permitted if the superior court in the county in which the record is maintained finds, after a hearing with notice thereof to every person in interest and the agency, that the exemption of such records is clearly unnecessary to protect any individual's right of privacy or any vital governmental function.

(3) Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.

[2005 c 274 § 402. Prior: (2006 c 302 § 11 expired July 1, 2006); (2006 c 75 § 2 expired July 1, 2006); (2006 c 8 § 111 expired July 1, 2006); (2003 1st sp.s. c 26 § 926 expired June 30, 2005); 2003 c 277 § 3; 2003 c 124 § 1; prior: 2002 c 335 § 1; 2002 c 224 § 2; 2002 c 205 § 4; 2002 c 172 § 1; prior: 2001 c 278 § 1; 2001 c 98 § 2; 2001 c 70 § 1; prior: 2000 c 134 § 3; 2000 c 56 § 1; 2000 c 6 § 5; prior: 1999 c 326 § 3; 1999 c 290 § 1; 1999 c 215 § 1; 1998 c 69 § 1; prior: 1997 c 310 § 2; 1997 c 274 § 8; 1997 c 250 § 7; 1997 c 239 § 4; 1997 c 220 § 120 (Referendum Bill No. 48, approved June 17, 1997); 1997 c 58 § 900; prior: 1996 c 305 § 2; 1996 c 253 § 302; 1996 c 191 § 88; 1996 c 80 § 1; 1995 c 267 § 6; prior: 1994 c 233 § 2; 1994 c 182 § 1; prior: 1993 c 360 § 2; 1993 c 320 § 9; 1993 c 280 § 35; prior: 1992 c 139 § 5; 1992 c 71 § 12; 1991 c 301 § 13; 1991 c 87 § 13; 1991 c 23 § 10; 1991 c 1 § 1; 1990 2nd ex.s. c 1 § 1103; 1990 c 256 § 1; prior: 1989 1st ex.s. c 9 § 407; 1989 c 352 § 7; 1989 c 279 § 23; 1989 c 238 § 1; 1989 c 205 § 20; 1989 c 189 § 3; 1989 c 11 § 12; prior: 1987 c 411 § 10; 1987 c 404 § 1; 1987 c 370 § 16; 1987 c 337 § 1; 1987 c 107 § 2; prior: 1986 c 299 § 25; 1986 c 276 § 7; 1985 c 414 § 8; 1984 c 143 § 21; 1983 c 133 § 10; 1982 c 64 § 1; 1977 ex.s. c 314 § 13; 1975-'76 2nd ex.s. c 82 § 5; 1975 1st ex.s. c 294 § 17; 1973 c 1 § 31 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.310.]

Notes:

Expiration date -- 2006 c 302: See note following RCW 66.28.180.

Expiration date -- 2006 c 75 § 2: "Section 2 of this act expires July 1, 2006." [2006 c 75 § 4.]

Expiration date -- 2006 c 8 § 111: "Section 111 of this act expires July 1, 2006." [2006 c 8 § 404.]

Expiration date -- Severability -- Effective dates -- 2003 1st sp.s. c 26: See notes following RCW 43.135.045.

Working group on veterans' records: "The protection from identity theft for veterans who choose to file their discharge papers with the county auditor is a matter of gravest concern. At the same time, the integrity of the public record of each county is a matter of utmost importance to the economic life of this state and to the right of each citizen to be secure in his or her ownership of real property and other rights and obligations of our citizens that rely upon the public record for their proof. Likewise the integrity of the public record is essential for the establishment of ancestral ties that may be of interest to this and future generations. While the public record as now kept by the county auditors is sufficient by itself for the accomplishment of these and many other public and private purposes, the proposed use of the public record for purposes that in their nature and intent are not public, so as to keep the veterans' discharge papers from disclosure to those of ill intent, causes concern among many segments of the population of this state.

In order to voice these concerns effectively and thoroughly, a working group may be convened by the joint committee on veterans' and military affairs to develop a means to preserve the integrity of the public record while protecting those veterans from identity theft." [2002 c 224 § 1.]

Effective date -- 2002 c 224 § 1: "Section 1 of this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 28, 2002]." [2002 c 224 § 4.]

Findings -- Severability -- Effective dates -- 2002 c 205 §§ 2, 3, and 4: See notes following RCW 28A.320.125.

Finding -- 2001 c 98: "The legislature finds that public health and safety is promoted when the public has knowledge that enables them to make informed choices about their health and safety. Therefore, the legislature declares, as a matter of public policy, that the public has a right to information necessary to protect members of the public from harm caused by alleged hazards or threats to the public.

The legislature also recognizes that the public disclosure of those portions of records containing specific and unique vulnerability assessments or specific and unique response plans, either of which is intended to prevent or mitigate criminal terrorist acts as defined in RCW 70.74.285, could have a substantial likelihood of threatening public safety. Therefore, the legislature declares, as a matter of public policy, that such specific and unique information should be protected from unnecessary disclosure." [2001 c 98 § 1.]

Findings -- Conflict with federal requirements -- Severability -- 2000 c 134: See notes following RCW 50.13.060.

Effective date -- 1998 c 69: See note following RCW 28B.95.025.

Effective date -- 1997 c 274: See note following RCW 41.05.021.

Referendum -- Other legislation limited -- Legislators' personal intent not indicated -- Reimbursements for election -- Voters' pamphlet, election requirements -- 1997 c 220: See RCW 36.102.800 through 36.102.803.

Part headings not law -- Severability -- 1997 c 220: See RCW 36.102.900 and 36.102.901.

Short title -- Part headings, captions, table of contents not law -- Exemptions and waivers from federal law -- Conflict with federal requirements -- Severability -- 1997 c 58: See RCW 74.08A.900 through 74.08A.904.

Severability -- 1996 c 305: See note following RCW 28B.85.020.

Findings -- Purpose -- Severability -- Part headings not law -- 1996 c 253: See notes following RCW 28B.109.010.

Captions not law -- Severability -- Effective dates -- 1995 c 267: See notes following RCW 43.70.052.

Effective date -- 1994 c 233: See note following RCW 70.123.075.

Effective date -- 1994 c 182: "This act shall take effect July 1, 1994." [1994 c 182 § 2.]

Effective date -- 1993 c 360: See note following RCW 18.130.085.

Effective date--Severability -- 1993 c 280: See RCW 43.330.902 and 43.330.903.

Finding -- 1991 c 301: See note following RCW 10.99.020.

Effective date -- 1991 c 87: See note following RCW 18.64.350.

Effective dates -- 1990 2nd ex.s. c 1: See note following RCW 84.52.010.

Severability -- 1990 2nd ex.s. c 1: See note following RCW 82.14.300.

Effective date -- Severability -- 1989 1st ex.s. c 9: See RCW 43.70.910 and 43.70.920.

Severability -- 1989 c 279: See RCW 43.163.901.

Severability -- 1989 c 11: See note following RCW 9A.56.220.

Severability -- 1987 c 411: See RCW 69.45.900.

Severability -- Effective date -- 1986 c 299: See RCW 28C.10.900 and 28C.10.902.

Severability -- 1986 c 276: See RCW 53.31.901.

Exemptions from public inspection
- accounting records of special inquiry judge: RCW 10.29.090.
- basic health plan records: RCW 70.47.150.
- bill drafting service of code reviser's office: RCW 1.08.027, 44.68.060.
- certificate submitted by individual with physical or mental disability seeking a driver's license: RCW 46.20.041.
- commercial fertilizers, sales reports: RCW 15.54.362.
- criminal records: Chapter 10.97 RCW.
- employer information: RCW 50.13.060.
- family and children's ombudsman: RCW 43.06A.050.
- legislative service center, information: RCW 44.68.060.
- medical quality assurance commission, reports required to be filed with: RCW 18.71.0195.
- organized crime
  - advisory board files: RCW 10.29.030.
  - investigative information: RCW 43.43.856.
- public transportation information: RCW 47.04.240.
- salary and fringe benefit survey information: RCW 41.06.160.

RCW 42.56.520
Prompt responses required.

Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives. Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond by either (1) providing the record; (2) acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request; or (3) denying the public record request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. In acknowledging receipt of a public record request that is unclear, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify the request, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives need not respond to it. Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

[1995 c 397 § 15; 1992 c 139 § 6; 1975 1st ex.s. c 294 § 18; 1973 c 1 § 32 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.320.]

RCW 42.56.550
Judicial review of agency actions.

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

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

(3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(5) For actions under this section against counties, the venue provisions of RCW 36.01.050 apply.

(6) Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

[2005 c 483 § 5; 2005 c 274 § 288; 1992 c 139 § 8; 1987 c 403 § 5; 1975 1st ex.s. c 294 § 20; 1973 c 1 § 34 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.340.]

Notes:

Reviser's note: This section was amended by 2005 c 274 § 288 and by 2005 c 483 § 5, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Intent -- Severability -- 1987 c 403: See notes following RCW 42.56.050.

Chapter 44-14 WAC
PUBLIC RECORDS ACT—MODEL RULES

WAC

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44-14-04004 Responsibilities of agency in providing records.
44-14-04005 Inspection of records.
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PROCESSING OF PUBLIC RECORDS REQUESTS—ELECTRONIC RECORDS

44-14-050 Processing of public records requests—Electronic records.

Comments to WAC 44-14-050

44-14-05001 Access to electronic records.
44-14-05002 "Reasonably locatable" and "reasonably translatable" electronic records.
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44-14-05004 Customized access.
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44-14-060 Exemptions.

Comments to WAC 44-14-060

44-14-06001 Agency must publish list of applicable exemptions.
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COSTS OF PROVIDING COPIES OF PUBLIC RECORDS

44-14-070 Costs of providing copies of public records.

Comments to WAC 44-14-070

44-14-07001 General rules for charging for copies.
44-14-07003 Charges for electronic records.
44-14-07004 Other statutes govern copying of particular records.
44-14-07005 Waiver of copying charges.
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REVIEW OF DENIALS OF PUBLIC RECORDS

44-14-080 Review of denials of public records.

Comments to WAC 44-14-080

44-14-08001 Agency internal procedure for review of denials of requests.
44-14-08002 Attorney general's office review of denials by state agencies.
44-14-08003 Alternative dispute resolution.
44-14-08004 Judicial review.

INTRODUCTORY COMMENTS

WAC 44-14-00001 Statutory authority and purpose. The legislature directed the attorney general to adopt advisory model rules on public records compliance and to revise them from time to time. RCW 42.17.348 (2) and (3)/42.56.570 (2) and (3). The purpose of the model rules is to provide information to records requestors and state and local agencies about "best practices" for complying with the Public Records Act, RCW 42.17.250/42.56.040 through 42.17.348/42.56.570 ("act"). The overall goal of the model rules is to establish a culture of compliance among agencies and a culture of cooperation among requestors by standardizing best practices throughout the state. The attorney general encourages state and local agencies to adopt the model rules (but not necessarily the comments) by regulation or ordinance.

The act applies to all state agencies and local units of government. The model rules use the term "agency" to refer to either a state or local agency. Upon adoption, each agency would change that term to name itself (such as changing references from "name of agency" to "city"). To assist state and local agencies considering adopting the model rules, an electronic version of the rules is available on the attorney general's web site, www.atg.wa.gov/records/modelrules.

The model rules are the product of an extensive outreach project. The attorney general held thirteen public forums all across the state to obtain the views of requestors and agencies. Many requestors and agencies also provided detailed written comments that are contained in the rule-making file. The model rules reflect many of the points and concerns presented in those forums.

The model rules provide one approach (or, in some cases, alternate approaches) to processing public records requests. Agencies vary enormously in size, resources, and complexity of requests received. Any "one-size-fits-all"

approach in the model rules, therefore, may not be best for requestors and agencies.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00001, filed 1/31/06, effective 3/3/06.]

WAC 44-14-00002 Format of model rules. We are publishing the model rules with comments. The comments have five-digit WAC numbers such as WAC 44-14-04001. The model rules themselves have three-digit WAC numbers such as WAC 44-14-040.

The comments are designed to explain the basis and rationale for the rules themselves as well as provide broader context and legal guidance. To do so, the comments contain many citations to statutes, cases, and formal attorney general's opinions.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00002, filed 1/31/06, effective 3/3/06.]

WAC 44-14-00003 Model rules and comments are nonbinding. The model rules, and the comments accompanying them, are advisory only and do not bind any agency. Accordingly, many of the comments to the model rules use the word "should" or "may" to describe what an agency or requestor is encouraged to do. The use of the words "should" or "may" are permissive, not mandatory, and are not intended to create any legal duty.

While the model rules and comments are nonbinding, they should be carefully considered by requestors and agencies. The model rules and comments were adopted after extensive statewide hearings and voluminous comments from a wide variety of interested parties.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00003, filed 1/31/06, effective 3/3/06.]

WAC 44-14-00004 Recodification of the act. On July 1, 2006, the act will be recodified. Chapter 274, Laws of 2005. The act will be known as the "Public Records Act" and will be codified in chapter 42.56 RCW. The exemptions in the act are recodified and grouped together by topic. The recodification does not change substantive law. The model rules provide dual citations to the current act, chapter 42.17 RCW, and the newly codified act, chapter 42.56 RCW (for example, RCW 42.17.340/42.56.550).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00004, filed 1/31/06, effective 3/3/06.]

WAC 44-14-00005 Training is critical. The act is complicated, and compliance requires training. Training can be the difference between a satisfied requestor and expensive litigation. The attorney general's office strongly encourages agencies to provide thorough and ongoing training to agency staff on public records compliance. All agency employees should receive basic training on public records compliance and records retention; public records officers should receive more intensive training.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00005, filed 1/31/06, effective 3/3/06.]

WAC 44-14-00006 Additional resources. Several web sites provide information on the act. The attorney general office's web site on public records is www.atg.wa.gov/records/deskbook.shtml. The municipal research service center, an entity serving local governments, provides a public records handbook at www.mrsc.org/Publications/prdpub04.pdf. A requestor's organization, the Washington Coalition for Open Government, has materials on its site at www.washingtoncog.org.

The Washington State Bar Association is publishing a twenty-two-chapter deskbook on public records in 2006. It will be available for purchase at www.wsba.org.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00006, filed 1/31/06, effective 3/3/06.]

AUTHORITY AND PURPOSE

WAC 44-14-010 Authority and purpose. (1) RCW 42.17.260(1)/42.56.070(1) requires each agency to make available for inspection and copying nonexempt "public records" in accordance with published rules. The act defines "public record" to include any "writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained" by the agency. RCW 42.17.260(2)/42.56.070(2) requires each agency to set forth "for informational purposes" every law, in addition to the Public Records Act, that exempts or prohibits the disclosure of public records held by that agency.

(2) The purpose of these rules is to establish the procedures (name of agency) will follow in order to provide full access to public records. These rules provide information to persons wishing to request access to public records of the (name of agency) and establish processes for both requestors and (name of agency) staff that are designed to best assist members of the public in obtaining such access.

(3) The purpose of the act is to provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government. The act and these rules will be interpreted in favor of disclosure. In carrying out its responsibilities under the act, the (name of agency) will be guided by the provisions of the act describing its purposes and interpretation.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-010, filed 1/31/06, effective 3/3/06.]

Comments to WAC 44-14-010

WAC 44-14-01001 Scope of coverage of Public Records Act. The act applies to an "agency." RCW 42.17.260(1)/42.56.070(1). "'Agency' includes all state agencies and all local agencies. 'State agency' includes every state office, department, division, bureau, board, commission, or other state agency. 'Local agency' includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." RCW 42.17.020(2).

Court files and judges' files are not subject to the act.[1] Access to these records is governed by court rules and common law. The model rules, therefore, do not address access to court records.

An entity which is not an "agency" can still be subject to the act when it is the functional equivalent of an agency. Courts have applied a four-factor, case-by-case test. The factors are:

(1) Whether the entity performs a government function;

(2) The level of government funding;

(3) The extent of government involvement or regulation; and

(4) Whether the entity was created by the government. Op. Att'y Gen. 2 (2002).[2]

Some agencies, most notably counties, are a collection of separate quasi-autonomous departments which are governed by different elected officials (such as a county assessor and prosecuting attorney). However, the act defines the county as a whole as an "agency" subject to the act. RCW 42.17.020(2). An agency should coordinate responses to records requests across departmental lines. RCW 42.17.253(1) (agency's public records officer must "oversee the agency's compliance" with act).

Notes: [1]*Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986).

[2]*See also Telford v. Thurston County Bd. of Comm'rs*, 95 Wn. App. 149, 162, 974 P.2d 886, *review denied*, 138 Wn.2d 1015, 989 P.2d 1143 (1999); Op. Att'y Gen. 5 (1991).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-01001, filed 1/31/06, effective 3/3/06.]

WAC 44-14-01002 Requirement that agencies adopt reasonable regulations for public records requests. The act provides: "Agencies shall adopt and enforce reasonable rules and regulations...to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency.... Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW 42.17.290/42.56.100. Therefore, an agency must adopt "reasonable" regulations providing for the "fullest assistance" to requestors and the "most timely possible action on requests."

At the same time, an agency's regulations must "protect public records from damage or disorganization" and "prevent excessive interference" with other essential agency functions. Another provision of the act states that providing public records should not "unreasonably disrupt the operations of the agency." RCW 42.17.270/42.56.080. This provision allows an agency to take reasonable precautions to prevent a requestor from being unreasonably disruptive or disrespectful to agency staff.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-01002, filed 1/31/06, effective 3/3/06.]

WAC 44-14-01003 Construction and application of act. The act declares: "The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW 42.17.251/42.56.030. The act further provides: "...mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." RCW 42.17.010(11). The act further provides: "Courts shall take into account the policy of (the act) that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.17.340(3)/42.56.550(3).

Because the purpose of the act is to allow people to be informed about governmental decisions (and therefore help keep government accountable) while at the same time being "mindful of the right of individuals to privacy," it should not be used to obtain records containing purely personal information that has absolutely no bearing on the conduct of government.

The act emphasizes three separate times that it must be liberally construed to effect its purpose, which is the disclosure of nonexempt public records. RCW 42.17.010, 42.17.251/42.56.030, 42.17.920.[1] The act places the burden on the agency of proving a record is not subject to disclosure or that its estimate of time to provide a full response is "reasonable." RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2). The act also encourages disclosure by awarding a requestor reasonable attorneys fees, costs, and a daily penalty if the agency fails to meet its burden of proving the record is not subject to disclosure or its estimate is not "reasonable." RCW 42.17.340(4)/42.56.550(4).

An additional incentive for disclosure is RCW 42.17.258, which provides: "No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply" with the act.

Note: [1]*See King County v. Sheehan*, 114 Wn. App. 325, 338, 57 P.3d 307 (2002) (referring to the three legislative intent provisions of the act as "the thrice-repeated legislative mandate that exemptions under the Public Records Act are to be narrowly construed.").

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-01003, filed 1/31/06, effective 3/3/06.]

AGENCY DESCRIPTION—CONTACT INFORMATION—PUBLIC RECORDS OFFICER

WAC 44-14-020 Agency description—Contact information—Public records officer. (1) The (name of agency) (describe services provided by agency). The (name of agency's) central office is located at (describe). The (name of agency) has field offices at (describe, if applicable).

(2) Any person wishing to request access to public records of (agency), or seeking assistance in making such a request should contact the public records officer of the (name of agency):

Public Records Officer
(Agency)
(Address)
(Telephone number)
(fax number)

(e-mail)

Information is also available at the (name of agency's) web site at (web site address).

(3) The public records officer will oversee compliance with the act but another (name of agency) staff member may process the request. Therefore, these rules will refer to the public records officer "or designee." The public records officer or designee and the (name of agency) will provide the "fullest assistance" to requestors; create and maintain for use by the public and (name of agency) officials an index to public records of the (name of agency, if applicable); ensure that public records are protected from damage or disorganization; and prevent fulfilling public records requests from causing excessive interference with essential functions of the (name of agency).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-020, filed 1/31/06, effective 3/3/06.]

Comments to WAC 44-14-020

WAC 44-14-02001 Agency must publish its procedures. An agency must publish its public records policies, organizational information, and methods for requestors to obtain public records. RCW 42.17.250(1)/42.56.040(1).[1] A state agency must publish its procedures in the Washington Administrative Code and a local agency must prominently display and make them available at the central office of such local agency. RCW 42.17.250(1)/42.56.040(1). An agency should post its public records rules on its web site. An agency cannot invoke a procedure if it did not publish or display it as required (unless the party had actual and timely notice of its contents). RCW 42.17.250(2)/42.56.040(2).

Note: [1]*See, e.g.*, WAC 44-06-030 (attorney general office's organizational and public records methods statement).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-02001, filed 1/31/06, effective 3/3/06.]

WAC 44-14-02002 Public records officers. An agency must appoint a public records officer whose responsibility is to serve as a "point of contact" for members of the public seeking public records. RCW 42.17.253(1). The purpose of this requirement is to provide the public with one point of contact within the agency to make a request. A state agency must provide the public records officer's name and contact information by publishing it in the state register. A state agency is encouraged to provide the public records officer's contact information on its web site. A local agency must publish the public records officer's name and contact information in a way reasonably calculated to provide notice to the public such as posting it on the agency's web site. RCW 42.17.253(3).

The public records officer is not required to personally fulfill requests for public records. A request can be fulfilled by an agency employee other than the public records officer. If the request is made to the public records officer, but should actually be fulfilled by others in the agency, the public records officer should route the request to the appropriate person or persons in the agency for processing. An agency is not required to hire a new staff member to be the public records officer.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-02002, filed 1/31/06, effective 3/3/06.]

AVAILABILITY OF PUBLIC RECORDS

WAC 44-14-030 Availability of public records. (1) **Hours for inspection of records.** Public records are available for inspection and copying during normal business hours of the (name of agency), (provide hours, e.g., Monday through Friday, 8:00 a.m. to 5:00 p.m., excluding legal holidays). Records must be inspected at the offices of the (name of agency).

(2) **Records index.** (*If agency keeps an index.*) An index of public records is available for use by members of the public, including (describe contents). The index may be accessed on-line at (web site address). (If there are multiple indices, describe each and its availability.)

(*If agency is local agency opting out of the index requirement.*) The (name of agency) finds that maintaining an index is unduly burdensome and would interfere with agency operations. The requirement would unduly burden or interfere with (name of agency) operations in the following ways (specify reasons).

(3) **Organization of records.** The (name of agency) will maintain its records in a reasonably organized manner. The (name of agency) will take reasonable actions to protect records from damage and disorganization. A requestor shall not take (name of agency) records from (name of agency) offices without the permission of the public records officer or designee. A variety of records is available on the (name of agency) web site at (web site address). Requestors are encouraged to view the documents available on the web site prior to submitting a records request.

(4) **Making a request for public records.**

(a) Any person wishing to inspect or copy public records of the (name of agency) should make the request in writing on the (name of agency's) request form, or by letter, fax, or e-mail addressed to the public records officer and including the following information:

- Name of requestor;
- Address of requestor;
- Other contact information, including telephone number and any e-mail address;
- Identification of the public records adequate for the public records officer or designee to locate the records; and
- The date and time of day of the request.

(b) If the requestor wishes to have copies of the records made instead of simply inspecting them, he or she should so indicate and make arrangements to pay for copies of the records or a deposit. Pursuant to section (insert section), standard photocopies will be provided at (amount) cents per page.

(c) A form is available for use by requestors at the office of the public records officer and on-line at (web site address).

(d) The public records officer or designee may accept requests for public records that contain the above information by telephone or in person. If the public records officer or designee accepts such a request, he or she will confirm receipt of the information and the substance of the request in writing.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-030, filed 1/31/06, effective 3/3/06.]

Comments to WAC 44-14-030

WAC 44-14-03001 "Public record" defined. Courts use a three-part test to determine if a record is a "public record." The document must be: A "writing," containing information "relating to the conduct of government" or the performance of any governmental or proprietary function, "prepared, owned, used, or retained" by an agency.[1]

(1) **Writing.** A "public record" can be any writing "regardless of physical form or characteristics." RCW 42.17.020(41). "Writing" is defined very broadly as: "...handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated." RCW 42.17.020(48). An e-mail is a "writing."

(2) **Relating to the conduct of government.** To be a "public record," a document must relate to the "conduct of government or the performance of any governmental or proprietary function." RCW 42.17.020(41). Almost all records held by an agency relate to the conduct of government; however, some do not. A purely personal record having absolutely no relation to the conduct of government is not a "public record." Even though a purely personal record might not be a "public record," a record of its existence might be. For example, a record showing the existence of a purely personal e-mail sent by an agency employee on an agency computer would probably be a "public record," even if the contents of the e-mail itself were not.[2]

(3) **"Prepared, owned, used, or retained."** A "public record" is a record "prepared, owned, used, or retained" by an agency. RCW 42.17.020(41).

A record can be "used" by an agency even if the agency does not actually possess the record. If an agency uses a record in its decision-making process it is a "public record."[3] For example, if an agency considered technical specifications of a public works project and returned the specifications to the contractor in another state, the specifications would be a "public record" because the agency "used" the document in its decision-making process.[4] The agency could be required to obtain the public record, unless doing so would be impossible. An agency cannot send its only copy of a record to a third party for the sole purpose of avoiding disclosure.[5]

Sometimes agency employees work on agency business from home computers. These home computer records (including e-mail) were "used" by the agency and relate to the "conduct of government" so they are "public records." RCW 42.17.020(41). However, the act does not authorize unbridled searches of agency property.[6] If agency property is not subject to unbridled searches, then neither is the home computer of an agency employee. Yet, because the home computer documents relating to agency business are "public records," they are subject to disclosure (unless exempt). Agencies should instruct employees that all public records, regardless of where they were created, should eventually be stored on agency computers. Agencies should ask employees to keep agency-related documents on home computers in separate folders and to routinely blind carbon copy ("bcc") work e-mails back to the employee's agency e-mail account. If the agency receives a request for records that are solely on employees' home computers, the agency should direct the employee to forward any responsive documents back to the agency, and the agency should process the request as it would if the records were on the agency's computers.

Notes:
[1] *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 748, 958 P.2d 260 (1998). For records held by the secretary of the senate or chief clerk of the house of representatives, a "public record" is a "legislative record" as defined in RCW 40.14.100. RCW 42.17.020(41).

[2] *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000).

[3] *Concerned Ratepayers v. Public Utility Dist. No. 1*, 138 Wn.2d 950, 958-61, 983 P.2d 635 (1999).

[4] *Id.*

[5] *See* Op. Att'y Gen. 11 (1989), at 4, n.2 ("We do not wish to encourage agencies to avoid the provisions of the public disclosure act by transferring public records to private parties. If a record otherwise meeting the statutory definition were transferred into private hands solely to prevent its public disclosure, we expect courts would take appropriate steps to require the agency to make disclosure or to sanction the responsible public officers.")

[6] *See Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-03001, filed 1/31/06, effective 3/3/06.]

WAC 44-14-03002 Times for inspection and copying of records. An agency must make records available for inspection and copying during the "customary office hours of the agency." RCW 42.17.280/42.56.090. If the agency is very small and does not have customary office hours of at least thirty hours per week, the records must be available from 9:00 a.m. to noon, and 1:00 p.m. to 4:00 p.m. The agency and requestor can make mutually agreeable arrangements for the times of inspection and copying.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-03002, filed 1/31/06, effective 3/3/06.]

WAC 44-14-03003 Index of records. State and local agencies are required by RCW 42.17.260/42.56.070 to provide an index for certain categories of records. An agency is not required to index every record it creates. Since agencies maintain records in a wide variety of ways, agency indices will also vary. An agency cannot use, rely on, or cite to as precedent a public record unless it was indexed or made available to the parties affected by it. RCW 42.17.260(6)/42.56.070(6). An agency should post its index on its web site.

The index requirements differ for state and local agencies.

A state agency must index only two categories of records:

(1) All records, if any, issued before July 1, 1990 for which the agency has maintained an index; and

(2) Final orders, declaratory orders, interpretive statements, and statements of policy issued after June 30, 1990. RCW 42.17.260(5)/42.56.070(5).

A state agency must adopt a rule governing its index.

A local agency may opt out of the indexing requirement if it issues a formal order specifying the reasons why doing so would "unduly burden or interfere with agency operations." RCW 42.17.260 (4)(a)/42.56.070 (4)(a). To lawfully opt out of the index requirement, a local agency must actually issue an order or adopt an ordinance specifying the reasons it cannot maintain an index.

The index requirements of the act were enacted in 1972 when agencies had far fewer records and an index was easier to maintain. However, technology allows agencies to map out, archive, and then electronically search for electronic documents. Agency resources vary greatly so not every agency can afford to utilize this technology. However, agencies should explore the feasibility of electronic indexing and retrieval to assist both the agency and requestor in locating public records.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-03003, filed 1/31/06, effective 3/3/06.]

WAC 44-14-03004 Organization of records. An agency must "protect public records from damage or disorganization." RCW 42.17.290/42.56.100. An agency owns public records (subject to the public's right, as defined in the act, to inspect or copy nonexempt records) and must maintain custody of them. RCW 40.14.020; chapter 434-615 WAC. Therefore, an agency should not allow a requestor to take original agency records out of the agency's office. An agency may send original records to a reputable commercial copying center to fulfill a records request if the agency takes reasonable precautions to protect the records. See WAC 44-14-07001(5).

The legislature encourages agencies to electronically store and provide public records:

Broad public access to state and local government records and information has potential for expanding citizen access to that information and for providing government services. Electronic methods of locating and transferring information can improve linkages between and among citizens...and governments. ...

It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public.

RCW 43.105.250. An agency could fulfill its obligation to provide "access" to a public record by providing a requestor with a link to an agency web site containing an electronic copy of that record. Agencies are encouraged to do so. For those without access to the internet, an agency could provide a computer terminal at its office.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-03004, filed 1/31/06, effective 3/3/06.]

WAC 44-14-03005 Retention of records. An agency is not required to retain every record it ever created or used. The state and local records committees approve a general retention schedule for state and local agency records that applies to records that are common to most agencies.[1] Individual agencies seek approval from the state or local records committee for retention schedules that are specific to their agency, or that, because of particular needs of the agency, must be kept longer than provided in the general records retention schedule. The retention schedules for state and local agencies are available at www.secstate.wa.gov/archives/gs.aspx.

Retention schedules vary based on the content of the record. For example, documents with no value such as internal meeting scheduling e-mails can be destroyed when no longer needed, but documents such as periodic accounting reports must be kept for a period of years. Because different kinds of records must be retained for different periods of time, an agency is prohibited from automatically deleting all e-mails after a short period of time (such as thirty days). While many of the e-mails could be destroyed when no longer needed, many others must be retained for several years. Indiscriminate automatic deletion of all e-mails after a short period may prevent an agency from complying with its retention duties and could complicate performance of its duties under the Public Records Act. An agency should have a retention policy in which employees save retainable documents and delete nonretainable ones. An agency is strongly encouraged to train employees on retention schedules.

The lawful destruction of public records is governed by retention schedules. The unlawful destruction of public records can be a crime. RCW 40.16.010 and 40.16.020.

An agency is prohibited from destroying a public record, even if it is about to be lawfully destroyed under a retention schedule, if a public records request has been made for that record. RCW 42.17.290/42.56.100. Additional retention requirements might apply if the records may be relevant to actual or anticipated litigation. The agency is required to retain the record until the record request has been resolved. An exception exists for certain portions of a state employee's personnel file. RCW 42.17.295/42.56.110.

Note: [1]An agency can be found to violate the act and be subject to the attorneys' fees and penalty provision if it prematurely destroys a requested record. *See Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-03005, filed 1/31/06, effective 3/3/06.]

WAC 44-14-03006 Form of requests. There is no statutorily required format for a valid public records request.[1] A request can be sent in by mail. RCW 42.17.290/42.56.100. A request can also be made by e-mail, fax, or orally. A request should be made to the agency's public records officer. An agency may prescribe means of requests in its rules. RCW 42.17.250/42.56.040 and 42.17.260(1)/42.56.070(1); RCW 34.05.220 (state agencies). An agency is encouraged to make its public records request form available on its web site.

A number of agencies routinely accept oral public records requests (for example, asking to look at a building permit). Some agencies find oral requests to be the best way to provide certain kinds of records. However, for some requests such as larger ones, oral requests may be allowed but are problematic. An oral request does not memorialize the exact records sought and therefore prevents a requestor or agency from later proving what was included in the request. Furthermore, as described in WAC 44-14-04002(1), a requestor must provide the agency with reasonable notice that the request is for the disclosure of public records; oral

requests, especially to agency staff other than the public records officer or designee, may not provide the agency with the required reasonable notice. Therefore, requestors are strongly encouraged to make written requests. If an agency receives an oral request, the agency staff person receiving it should immediately reduce it to writing and then verify in writing with the requestor that it correctly memorializes the request.

An agency should have a public records request form. An agency request form should ask the requestor whether he or she seeks to inspect the records, receive a copy of them, or to inspect the records first and then consider selecting records to copy. An agency request form should recite that inspection of records is free and provide the per-page charge for standard photocopies.

An agency request form should require the requestor to provide contact information so the agency can communicate with the requestor to, for example, clarify the request, inform the requestor that the records are available, or provide an explanation of an exemption. Contact information such as a name, phone number, and address or e-mail should be provided. Requestors should provide an e-mail address because it is an efficient means of communication and creates a written record of the communications between them and the agency. An agency should not require a requestor to provide a driver's license number, date of birth, or photo identification. This information is not necessary for the agency to contact the requestor and requiring it might intimidate some requestors.

An agency may ask a requestor to prioritize the records he or she is requesting so that the agency is able to provide the most important records first. An agency is not required to ask for prioritization, and a requestor is not required to provide it.

An agency cannot require the requestor to disclose the purpose of the request with two exceptions. RCW 42.17.270/42.56.080. First, if the request is for a list of individuals, an agency may ask the requestor if he or she intends to use the records for a commercial purpose.[2] An agency should specify on its request form that the agency is not authorized to provide public records consisting of a list of individuals for a commercial use. RCW 42.17.260(9)/42.56.070(9).

Second, an agency may seek information sufficient to allow it to determine if another statute prohibits disclosure. For example, some statutes allow an agency to disclose a record only to a claimant for benefits or his or her representative. In such cases, an agency is authorized to ask the requestor if he or she fits this criterion.

An agency is not authorized to require a requestor to indemnify the agency. Op. Att'y Gen. 12 (1988).[3]

Notes: [1]*Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004) ("there is no official format for a valid PDA request.").

[2]Op. Att'y Gen. 12 (1988), at 11; Op. Att'y Gen. 2 (1998), at 4.

[3]RCW 42.17.258/42.56.060 provides: "No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter." Therefore, an agency has little need for an indemnification clause. Requiring a requestor to indemnify an agency inhibits some requestors from exercising their right to request public records. Op. Att'y Gen. 12 (1988), at 11.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-03006, filed 1/31/06, effective 3/3/06.]

PROCESSING OF PUBLIC RECORDS REQUESTS—GENERAL

WAC 44-14-040 Processing of public records requests—General. (1) **Providing "fullest assistance."** The (name of agency) is charged by statute with adopting rules which provide for how it will "provide full access to public records," "protect records from damage or disorganization," "prevent excessive interference with other essential functions of the agency," provide "fullest assistance" to requestors, and provide the "most timely possible action" on public records requests. The public records officer or designee will process requests in the order allowing the most requests to be processed in the most efficient manner.

(2) **Acknowledging receipt of request.** Within five business days of receipt of the request, the public records officer will do one or more of the following:

(a) Make the records available for inspection or copying;

(b) If copies are requested and payment of a deposit for the copies, if any, is made or terms of payment are agreed upon, send the copies to the requestor;

(c) Provide a reasonable estimate of when records will be available; or

(d) If the request is unclear or does not sufficiently identify the requested records, request clarification from the requestor. Such clarification may be requested and provided by telephone. The public records officer or designee may revise the estimate of when records will be available; or

(e) Deny the request.

(3) **Consequences of failure to respond.** If the (name of agency) does not respond in writing within five business days of receipt of the request for disclosure, the requestor should consider contacting the public records officer to determine the reason for the failure to respond.

(4) **Protecting rights of others.** In the event that the requested records contain information that may affect rights of others and may be exempt from disclosure, the public records officer may, prior to providing the records, give notice to such others whose rights may be affected by the disclosure. Such notice should be given so as to make it possible for those other persons to contact the requestor and ask him or her to revise the request, or, if necessary, seek an order from a court to prevent or limit the disclosure. The notice to the affected persons will include a copy of the request.

(5) **Records exempt from disclosure.** Some records are exempt from disclosure, in whole or in part. If the (name of agency) believes that a record is exempt from disclosure and should be withheld, the public records officer will state the specific exemption and provide a brief explanation of why the record or a portion of the record is being withheld. If only a portion of a record is exempt from disclosure, but the remainder is not exempt, the public records officer will redact the exempt portions, provide the nonexempt portions, and indicate to the requestor why portions of the record are being redacted.

(6) **Inspection of records.**

(a) Consistent with other demands, the (name of agency) shall promptly provide space to inspect public records. No member of the public may remove a document from the viewing area or disassemble or alter any document. The requestor shall indicate which documents he or she wishes the agency to copy.

(b) The requestor must claim or review the assembled records within thirty days of the (name of agency's) notification to him or her that the records are available for inspection or copying. The agency will notify the requestor in writing of this requirement and inform the requestor that he or she should contact the agency to make arrangements to claim or review the records. If the requestor or a representative of the requestor fails to claim or review the records within the thirty-day period or make other arrangements, the (name of agency) may close the request and refile the assembled records. Other public records requests can be processed ahead of a subsequent request by the same person for the same or almost identical records, which can be processed as a new request.

(7) **Providing copies of records.** After inspection is complete, the public records officer or designee shall make the requested copies or arrange for copying.

(8) **Providing records in installments.** When the request is for a large number of records, the public records officer or designee will provide access for inspection and copying in installments, if he or she reasonably determines that it would be practical to provide the records in that way. If, within thirty days, the requestor fails to inspect the entire set of records or one or more of the installments, the public records officer or designee may stop searching for the remaining records and close the request.

(9) **Completion of inspection.** When the inspection of the requested records is complete and all requested copies are provided, the public records officer or designee will indicate that the (name of agency) has completed a diligent search for the requested records and made any located nonexempt records available for inspection.

(10) **Closing withdrawn or abandoned request.** When the requestor either withdraws the request or fails to fulfill his or her obligations to inspect the records or pay the deposit or final payment for the requested copies, the public records officer will close the request and indicate to the requestor that the (name of agency) has closed the request.

(11) **Later discovered documents.** If, after the (name of agency) has informed the requestor that it has provided all available records, the (name of agency) becomes aware of additional responsive documents existing at the time of the request, it will promptly inform the requestor of the additional documents and provide them on an expedited basis.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-040, filed 1/31/06, effective 3/3/06.]

Comments on WAC 44-14-040

WAC 44-14-04001 Introduction. Both requestors and agencies have responsibilities under the act. The public records process can function properly only when both parties perform their respective responsibilities. An agency has a duty to promptly provide access to all nonexempt public records.[1] A requestor has a duty to request identifiable records, inspect the assembled records or pay for the copies, and be respectful to agency staff.[2]

Requestors should keep in mind that all agencies have essential functions in addition to providing public records. Agencies also have greatly differing resources. The act recognizes that agency public records procedures should prevent "excessive interference" with the other "essential functions" of the agency. RCW 42.17.290/42.56.100. Therefore, while providing public records is an essential function of an agency, it is not required to abandon its other, nonpublic records functions. Agencies without a full-time public records officer may assign staff part-time to fulfill records requests, provided the agency is providing the "fullest assistance" and the "most timely possible" action on the request. The proper level of staffing for public records requests will vary among agencies, considering the complexity and number of requests to that agency, agency resources, and the agency's other functions.

The burden of proof is on an agency to prove its estimate of time to provide a full response is "reasonable." RCW 42.17.340(2)/42.56.550(2). An agency should be prepared to explain how it arrived at its estimate of time and why the estimate is reasonable.

Agencies are encouraged to use technology to provide public records more quickly and, if possible, less expensively. An agency is allowed, of course, to do more for the requestor than is required by the letter of the act. Doing so often saves the agency time and money in the long run, improves relations with the public, and prevents litigation. For example, agencies are encouraged to post many nonexempt records of broad public interest on the internet. This may result in fewer requests for public records. See RCW 43.105.270 (state agencies encouraged to post frequently sought documents on the internet).

Notes: [1]RCW 42.17.260(1)/42.56.070(1) (agency "shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions" listed in the act or other statute).

[2]*See* RCW 42.17.270/42.56.080 ("identifiable record" requirement); RCW 42.17.300/42.56.120 (claim or review requirement); RCW 42.17.290/42.56.100 (agency may prevent excessive interference with other essential agency functions).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04001, filed 1/31/06, effective 3/3/06.]

WAC 44-14-04002 Obligations of requestors. (1) **Reasonable notice that request is for public records.** A requestor must give an agency reasonable notice that the request is being made pursuant to the act. Requestors are encouraged to cite or name the act but are not required to do so.[1] A request using the terms "public records," "public disclosure," "FOIA," or "Freedom of Information Act" (the terms commonly used for federal records requests) should provide an agency with reasonable notice in most cases. A requestor should not submit a "stealth" request, which is buried in another document in an attempt to trick the agency into not responding.

(2) **Identifiable record.** A requestor must request an "identifiable record" or "class of records" before an agency must respond to it. RCW 42.17.270/42.56.080 and

42.17.340(1)/42.56.550(1). An "identifiable record" is one that agency staff can reasonably locate.[2] The act does not allow a requestor to search through agency files for records which cannot be reasonably identified or described to the agency.[3] However, a requestor is not required to identify the exact record he or she seeks. For example, if a requestor requested an agency's "2001 budget," but the agency only had a 2000-2002 budget, the requestor made a request for an identifiable record.[4]

An "identifiable record" is not a request for "information" in general.[5] For example, asking "what policies" an agency has for handling discrimination complaints is merely a request for "information."[6] A request to inspect or copy an agency's policies and procedures for handling discrimination complaints would be a request for an "identifiable record."

Public records requests are not interrogatories. An agency is not required to conduct legal research for a requestor.[7] A request for "any law that allows the county to impose taxes on me" is not a request for an identifiable record. Conversely, a request for "all records discussing the passage of this year's tax increase on real property" is a request for an "identifiable record."

When a request uses an inexact phrase such as all records "relating to" a topic (such as "all records relating to the property tax increase"), the agency may interpret the request to be for records which directly and fairly address the topic. When an agency receives a "relating to" or similar request, it should seek clarification of the request from the requestor.

(3) **"Overbroad" requests.** An agency cannot "deny a request for identifiable public records based solely on the basis that the request is overbroad." RCW 42.17.270/42.56.080. However, if such a request is not for identifiable records or otherwise is not proper, the request can still be denied. When confronted with a request that is unclear, an agency should seek clarification.

Notes:
[1] *Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000).
[2] *Bonamy v. City of Seattle*, 92 Wn. App. 403, 410, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999) ("identifiable record" requirement is satisfied when there is a "reasonable description" of the record "enabling the government employee to locate the requested records.").
[3] *Limstrom v. Ladenburg*, 136 Wn.2d 595, 604, n.3, 963 P.2d 869 (1998), *appeal after remand*, 110 Wn. App. 133, 39 P.3d 351 (2002).
[4] *Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, n.4, 59 P.3d 109 (2002).
[5] *Bonamy*, 92 Wn. App. at 409.
[6] *Id.*
[7] *See Limstrom*, 136 Wn.2d at 604, n.3 (act does not require "an agency to go outside its own records and resources to try to identify or locate the record requested."); *Bonamy*, 92 Wn. App. at 409 (act "does not require agencies to research or explain public records, but only to make those records accessible to the public.").

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04002, filed 1/31/06, effective 3/3/06.]

WAC 44-14-04003 Responsibilities of agencies in processing requests. (1) **Similar treatment and purpose of the request.** The act provides: "Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request" (except to determine if the request is for a commercial use or would violate another statute prohibiting disclosure). RCW 42.17.270/42.56.080.[1] The act also requires an agency to take the "most timely possible action on requests" and make records "promptly available." RCW 42.17.290/42.56.100 and 42.17.270/42.56.080. However, treating requestors similarly does not mean that agencies must process requests strictly in the order received because this might not be providing the "most timely possible action" for all requests. A relatively simple request need not wait for a long period of time while a much larger request is being fulfilled. Agencies are encouraged to be flexible and process as many requests as possible even if they are out of order.[3]

An agency cannot require a requestor to state the purpose of the request (with limited exceptions). RCW 42.17.270/42.56.080. However, in an effort to better understand the request and provide all responsive records, the agency can inquire about the purpose of the request. The requestor is not required to answer the agency's inquiry (with limited exceptions as previously noted).

(2) **Provide "fullest assistance" and "most timely possible action."** The act requires agencies to adopt and enforce reasonable rules to provide for the "fullest assistance" to a requestor. RCW 42.17.290/42.56.100. The "fullest assistance" principle should guide agencies when processing requests. In general, an agency should devote sufficient staff time to processing records requests, consistent with the act's requirement that fulfilling requests should not be an "excessive interference" with the agency's "other essential functions." RCW 42.17.290/42.56.100. The agency should recognize that fulfilling public records requests is one of the agency's duties, along with its others.

The act also requires agencies to adopt and enforce rules to provide for the "most timely possible action on requests." RCW 42.17.290/42.56.100. This principle should guide agencies when processing requests. It should be noted that this provision requires the most timely "possible" action on requests. This recognizes that an agency is not always capable of fulfilling a request as quickly as the requestor would like.

(3) **Communicate with requestor.** Communication is usually the key to a smooth public records process for both requestors and agencies. Clear requests for a small number of records usually do not require predelivery communication with the requestor. However, when an agency receives a large or unclear request, the agency should communicate with the requestor to clarify the request. If the request is modified orally, the public records officer or designee should memorialize the communication in writing.

For large requests, the agency may ask the requestor to prioritize the request so that he or she receives the most important records first. If feasible, the agency should provide periodic updates to the requestor of the progress of the request. Similarly, the requestor should periodically communicate with the agency and promptly answer any clarification questions. Sometimes a requestor finds the records he or she is seeking at the beginning of a request. If so, the requestor should communicate with the agency that the requested records have been provided and that he or she is canceling the remainder of the request. If the requestor's cancellation communication is not in writing, the agency should confirm it in writing.

(4) **Failure to provide initial response within five business days.** Within five business days of receiving a request, an agency must provide an initial response to requestor. The initial response must do one of four things:

(a) Provide the record;

(b) Acknowledge that the agency has received the request and provide a reasonable estimate of the time it will require to fully respond;

(c) Seek a clarification of the request; or

(d) Deny the request. RCW 42.17.320/42.56.520. An agency's failure to provide an initial response is arguably a violation of the act.[2]

(5) **No duty to create records.** An agency is not obligated to create a new record to satisfy a records request.[4] However, sometimes it is easier for an agency to create a record responsive to the request rather than collecting and making available voluminous records that contain small pieces of the information sought by the requestor or find itself in a controversy about whether the request requires the creation of a new record. The decision to create a new record is left to the discretion of the agency. If the agency is considering creating a new record instead of disclosing the underlying records, it should obtain the consent of the requestor to ensure that the requestor is not actually seeking the underlying records. Making an electronic copy of an electronic record is not "creating" a new record; instead, it is similar to copying a paper copy. Similarly, eliminating a field of an electronic record can be a method of redaction; it is similar to redacting portions of a paper record using a black pen or white-out tape to make it available for inspection or copying.

(6) **Provide a reasonable estimate of the time to fully respond.** Unless it is providing the records or claiming an exemption from disclosure within the five-business day period, an agency must provide a reasonable estimate of the time it will take to fully respond to the request. RCW 42.17.320/42.56.520. Fully responding can mean processing the request (assembling records, redacting, preparing a withholding index, or notifying third parties named in the records who might seek an injunction against disclosure) or determining if the records are exempt from disclosure.

An estimate must be "reasonable." The act provides a requestor a quick and simple method of challenging the reasonableness of an agency's estimate. RCW 42.17.340(2)/42.56.550(2). See WAC 44-14-08004 (5)(b). The burden of proof is on the agency to prove its estimate is "reasonable." RCW 42.17.340(2)/42.56.550(2).

To provide a "reasonable" estimate, an agency should not use the same estimate for every request. An agency should roughly calculate the time it will take to respond to the request and send estimates of varying lengths, as appropriate. Some very large requests can legitimately take months or longer to fully provide. There is no standard amount of time for fulfilling a request so reasonable estimates should vary.

Some agencies send form letters with thirty-day estimates to all requestors, no matter the size or complexity of the request. Form letter thirty-day estimates are rarely "reasonable" because an agency, which has the burden of proof, could find it difficult to prove that every single request it receives would take the same thirty-day period.

In order to avoid unnecessary litigation over the reasonableness of an estimate, an agency should briefly explain to the requestor the basis for the estimate in the initial response. The explanation need not be elaborate but should allow the requestor to make a threshold determination of whether he or she should question that estimate further or has a basis to seek judicial review of the reasonableness of the estimate.

An agency should either fulfill the request within the estimated time or, if warranted, communicate with the requestor about clarifications or the need for a revised estimate. An agency should not ignore a request and then continuously send extended estimates. Routine extensions with little or no action to fulfill the request would show that the previous estimates probably were not "reasonable." Extended estimates are appropriate when the circumstances have changed (such as an increase in other requests or discovering that the request will require extensive redaction). An estimate can be revised when appropriate, but unwarranted serial extensions have the effect of denying a requestor access to public records.

(7) **Seek clarification of a request or additional time.** An agency may seek a clarification of an "unclear" request. RCW 42.17.320/42.56.520. An agency can only seek a clarification when the request is objectively "unclear." Seeking a "clarification" of an objectively clear request delays access to public records.

If the requestor fails to clarify an unclear request, the agency need not respond to it further. RCW 42.17.320/42.56.520. If the requestor does not respond to the agency's request for a clarification within thirty days of the agency's request, the agency may consider the request abandoned. If the agency considers the request abandoned, it should send a closing letter to the requestor.

An agency may take additional time to provide the records or deny the request if it is awaiting a clarification. RCW 42.17.320/42.56.520. After providing the initial response and perhaps even beginning to assemble the records, an agency might discover it needs to clarify a request and is allowed to do so. A clarification could also affect a reasonable estimate.

(8) **Preserving requested records.** If a requested record is scheduled shortly for destruction, and the agency receives a public records request for it, the record cannot be destroyed until the request is resolved. RCW 42.17.290/42.56.100.[5] Once a request has been closed, the agency can destroy the requested records in accordance with its retention schedule.

(9) **Searching for records.** An agency must conduct an objectively reasonable search for responsive records. A requestor is not required to "ferret out" records on his or her own.[6] A reasonable agency search usually begins with the public records officer for the agency or a records coordinator for a department of the agency deciding where the records are likely to be and who is likely to know where they are. One of the most important parts of an adequate search is to decide how wide the search will be. If the agency is small, it might be appropriate to initially ask all agency employees if they have responsive records. If the agency is larger, the agency may choose to initially ask only the staff of the department or departments of an agency most likely to have the records. For example, a request for records showing or discussing payments on a public works project might initially be directed to all staff in the finance and public works departments if those departments are deemed most likely to have

the responsive documents, even though other departments may have copies or alternative versions of the same documents. Meanwhile, other departments that may have documents should be instructed to preserve their records in case they are later deemed to be necessary to respond to the request. The agency could notify the requestor which departments are being surveyed for the documents so the requestor may suggest other departments. It is better to be over inclusive rather than under inclusive when deciding which staff should be contacted, but not everyone in an agency needs to be asked if there is no reason to believe he or she has responsive records. An e-mail to staff selected as most likely to have responsive records is usually sufficient. Such an e-mail also allows an agency to document whom it asked for records.

Agency policies should require staff to promptly respond to inquiries about responsive records from the public records officer.

After records which are deemed responsive are located, an agency should take reasonable steps to narrow down the number of records to those which are responsive. In some cases, an agency might find it helpful to consult with the requestor on the scope of the documents to be assembled. An agency cannot "bury" a requestor with nonresponsive documents. However, an agency is allowed to provide arguably, but not clearly, responsive records to allow the requestor to select the ones he or she wants, particularly if the requestor is unable or unwilling to help narrow the scope of the documents.

(10) **Expiration of reasonable estimate.** An agency should provide a record within the time provided in its reasonable estimate or communicate with the requestor that additional time is required to fulfill the request based on specified criteria. Unjustified failure to provide the record by the expiration of the estimate is a denial of access to the record.

(11) **Notice to affected third parties.** Sometimes an agency decides it must release all or a part of a public record affecting a third party. The third party can file an action to obtain an injunction to prevent an agency from disclosing it, but the third party must prove the record or portion of it is exempt from disclosure.[7] RCW 42.17.330/42.56.540. Before sending a notice, an agency should have a reasonable belief that the record is arguably exempt. Notices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requestor's access to a disclosable record.

The act provides that before releasing a record an agency may, at its "option," provide notice to a person named in a public record or to whom the record specifically pertains (unless notice is required by law). RCW 42.17.330/42.56.540. This would include all of those whose identity could reasonably be ascertained in the record and who might have a reason to seek to prevent the release of the record. An agency has wide discretion to decide whom to notify or not notify. First, an agency has the "option" to notify or not (unless notice is required by law). RCW 42.17.330/42.56.540. Second, if it acted in good faith, an agency cannot be held liable for its failure to notify enough people under the act. RCW 42.17.258/42.56.060. However, if an agency had a contractual obligation to provide notice of a request but failed to do so, the agency might lose the immunity provided by RCW 42.17.258/42.56.060 because breaching the agreement probably is not a "good faith" attempt to comply with the act.

The practice of many agencies is to give ten days' notice. Many agencies expressly indicate the deadline date to avoid any confusion. More notice might be appropriate in some cases, such as when numerous notices are required, but every additional day of notice is another day the potentially disclosable record is being withheld. When it provides a notice, the agency should include the notice period in the "reasonable estimate" it provides to a requestor.

The notice informs the third party that release will occur on the stated date unless he or she obtains an order from a court enjoining release. The requestor has an interest in any legal action to prevent the disclosure of the records he or she requested. Therefore, the agency's notice should inform the third party that he or she should name the requestor as a party to any action to enjoin disclosure. If an injunctive action is filed, the third party or agency should name the requestor as a party or, at a minimum, must inform the requestor of the action to allow the requestor to intervene.

(12) **Later discovered records.** If the agency becomes aware of the existence of records responsive to a request which were not provided, the agency should notify the requestor in writing and provide a brief explanation of the circumstances.

Notes: [1]*See also* Op. Att'y Gen. 2 (1998).

[2]*See Smith v. Okanogan County,* 100 Wn. App. 7, 13, 994 P.2d 857 (2000) ("When an agency fails to respond as provided in RCW 42.17.320 (42.56.520), it violates the act and the individual requesting the public record is entitled to a statutory penalty.").

[3]While an agency can fulfill requests out of order, an agency is not allowed to ignore a large request while it is exclusively fulfilling smaller requests. The agency should strike a balance between fulfilling small and large requests.

[4]*Smith,* 100 Wn. App. at 14.

[5]An exception is some state-agency employee personnel records. RCW 42.17.295/42.56.110.

[6]*Daines v. Spokane County,* 111 Wn. App. 342, 349, 44 P.3d 909 (2002) ("an applicant need not exhaust his or her own ingenuity to 'ferret out' records through some combination of 'intuition and diligent research'").

[7]The agency holding the record can also file a RCW 42.17.330/42.56.540 injunctive action to establish that it is not required to release the record or portion of it.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-04003, filed 6/15/07, effective 7/16/07. Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04003, filed 1/31/06, effective 3/3/06.]

WAC 44-14-04004 Responsibilities of agency in providing records. (1) **General.** An agency may simply provide the records or make them available within the five-business day period of the initial response. When it does so, an agency should also provide the requestor a written cover letter or e-mail briefly describing the records provided and informing the requestor that the request has been closed. This assists the agency in later proving that it provided the specified records on a certain date and told the requestor that the request had been closed. However, a cover letter or e-mail might not be practical in some circumstances, such as when the agency provides a small number of records or fulfills routine requests.

An agency can, of course, provide the records sooner than five business days. Providing the "fullest assistance" to

a requestor would mean providing a readily available record as soon as possible. For example, an agency might routinely prepare a premeeting packet of documents three days in advance of a city council meeting. The packet is readily available so the agency should provide it to a requestor on the same day of the request so he or she can have it for the council meeting.

(2) **Means of providing access.** An agency must make nonexempt public records "available" for inspection or provide a copy. RCW 42.17.270/42.56.080. An agency is only required to make records "available" and has no duty to explain the meaning of public records.[1] Making records available is often called "access."

Access to a public record can be provided by allowing inspection of the record, providing a copy, or posting the record on the agency's web site and assisting the requestor in finding it (if necessary). An agency must mail a copy of records if requested and if the requestor pays the actual cost of postage and the mailing container.[2] The requestor can specify which method of access (or combination, such as inspection and then copying) he or she prefers. Different processes apply to requests for inspection versus copying (such as copy charges) so an agency should clarify with a requestor whether he or she seeks to inspect or copy a public record.

An agency can provide access to a public record by posting it on its web site. If requested, an agency should provide reasonable assistance to a requestor in finding a public record posted on its web site. If the requestor does not have internet access, the agency may provide access to the record by allowing the requestor to view the record on a specific computer terminal at the agency open to the public. An agency is not required to do so. Despite the availability of the record on the agency's web site, a requestor can still make a public records request and inspect the record or obtain a copy of it by paying the appropriate per-page copying charge.

(3) **Providing records in installments.** The act now provides that an agency must provide records "if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure." RCW 42.17.270/42.56.080. The purpose of this provision is to allow requestors to obtain records in installments as they are assembled and to allow agencies to provide records in logical batches. The provision is also designed to allow an agency to only assemble the first installment and then see if the requestor claims or reviews it before assembling the next installments.

Not all requests should be provided in installments. For example, a request for a small number of documents which are located at nearly the same time should be provided all at once. Installments are useful for large requests when, for example, an agency can provide the first box of records as an installment. An agency has wide discretion to determine when providing records in installments is "applicable." However, an agency cannot use installments to delay access by, for example, calling a small number of documents an "installment" and sending out separate notifications for each one. The agency must provide the "fullest assistance" and the "most timely possible action on requests" when processing requests. RCW 42.17.290/42.56.100.

(4) **Failure to provide records.** A "denial" of a request can occur when an agency:

Does not have the record;

Fails to respond to a request;

Claims an exemption of the entire record or a portion of it; or

Without justification, fails to provide the record after the reasonable estimate expires.

(a) **When the agency does not have the record.** An agency is only required to provide access to public records it has or has used.[3] An agency is not required to create a public record in response to a request.

An agency must only provide access to public records in existence at the time of the request. An agency is not obligated to supplement responses. Therefore, if a public record is created or comes into the possession of the agency after the request is received by the agency, it is not responsive to the request and need not be provided. A requestor must make a new request to obtain subsequently created public records.

Sometimes more than one agency holds the same record. When more than one agency holds a record, and a requestor makes a request to the first agency, the first agency cannot respond to the request by telling the requestor to obtain the record from the second agency. Instead, an agency must provide access to a record it holds regardless of its availability from another agency.[4]

An agency is not required to provide access to records that were not requested. An agency does not "deny" a request when it does not provide records that are outside the scope of the request because they were never asked for.

(b) **Claiming exemptions.**

(i) **Redactions.** If a portion of a record is exempt from disclosure, but the remainder is not, an agency generally is required to redact (black out) the exempt portion and then provide the remainder. RCW 42.17.310(2)/42.56.210(1). There are a few exceptions.[5] Withholding an entire record where only a portion of it is exempt violates the act.[6] Some records are almost entirely exempt but small portions remain nonexempt. For example, information revealing the identity of a crime victim is exempt from disclosure. RCW 42.17.310 (1)(e)/42.56.240(2). If a requestor requested a police report in a case in which charges have been filed, the agency must redact the victim's identifying information but provide the rest of the report.

Statistical information "not descriptive of any readily identifiable person or persons" is generally not subject to redaction or withholding. RCW 42.17.310(2)/42.56.210(1). For example, if a statute exempted the identity of a person who had been assessed a particular kind of penalty, and an agency record showed the amount of penalties assessed against various persons, the agency must provide the record with the names of the persons redacted but with the penalty amounts remaining.

Originals should not be redacted. For paper records, an agency should redact materials by first copying the record and then either using a black marker on the copy or covering the exempt portions with copying tape, and then making a copy. It is often a good practice to keep the initial copies which were redacted in case there is a need to make additional copies for disclosure or to show what was redacted. For electronic records such as data bases, an agency can sometimes redact a field of exempt information by excluding it from the set of fields to be copied. However, in some

instances electronic redaction might not be feasible and a paper copy of the record with traditional redaction might be the only way to provide the redacted record. If a record is redacted electronically, by deleting a field of data or in any other way, the agency must identify the redaction and state the basis for the claimed exemption as required by RCW 42.56.210(3). See (b)(ii) of this subsection.

(ii) **Brief explanation of withholding.** When an agency claims an exemption for an entire record or portion of one, it must inform the requestor of the statutory exemption and provide a brief explanation of how the exemption applies to the record or portion withheld. RCW 42.17.310(4)/42.56.210(3). The brief explanation should cite the statute the agency claims grants an exemption from disclosure. The brief explanation should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper. Nonspecific claims of exemption such as "proprietary" or "privacy" are insufficient.

One way to properly provide a brief explanation of the withheld record or redaction is for the agency to provide a withholding index. It identifies the type of record, its date and number of pages, and the author or recipient of the record (unless their identity is exempt).[7] The withholding index need not be elaborate but should allow a requestor to make a threshold determination of whether the agency has properly invoked the exemption.

(5) **Notifying requestor that records are available.** If the requestor sought to inspect the records, the agency should notify him or her that the entire request or an installment is available for inspection and ask the requestor to contact the agency to arrange for a mutually agreeable time for inspection.[8] The notification should recite that if the requestor fails to inspect or copy the records or make other arrangements within thirty days of the date of the notification that the agency will close the request and refile the records. An agency might consider on a case-by-case basis sending the notification by certified mail to document that the requestor received it.

If the requestor sought copies, the agency should notify him or her of the projected costs and whether a copying deposit is required before the copies will be made. The notification can be oral to provide the most timely possible response.

(6) **Documenting compliance.** An agency should have a process to identify which records were provided to a requestor and the date of production. In some cases, an agency may wish to number-stamp or number-label paper records provided to a requestor to document which records were provided. The agency could also keep a copy of the numbered records so either the agency or requestor can later determine which records were or were not provided. However, the agency should balance the benefits of stamping or labeling the documents and making extra copies against the costs and burdens of doing so.

If memorializing which specific documents were offered for inspection is impractical, an agency might consider documenting which records were provided for inspection by making an index or list of the files or records made available for inspection.

Notes:
[1] *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999).

[2] *Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 86 Wn. App. 688, 695, 937 P.2d 1176 (1997).

[3] *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004).

[4] *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 132, 580 P.2d 246 (1978).

[5] The two main exceptions to the redaction requirement are state "tax information" (RCW 82.32.330 (1)(c)) and law enforcement case files in active cases (*Newman v. King County*, 133 Wn.2d 565, 574, 947 P.2d 712 (1997). Neither of these two kinds of records must be redacted but rather may be withheld in their entirety.

[6] *Seattle Fire Fighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129, 132, 737 P.2d 1302 (1987).

[7] *Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 271, n.18, 884 P.2d 592 (1994) ("*PAWS II*").

[8] For smaller requests, the agency might simply provide them with the initial response or earlier so no notification is necessary.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-04004, filed 6/15/07, effective 7/16/07. Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04004, filed 1/31/06, effective 3/3/06.]

WAC 44-14-04005 Inspection of records. (1) **Obligation of requestor to claim or review records.** After the agency notifies the requestor that the records or an installment of them are ready for inspection or copying, the requestor must claim or review the records or the installment. RCW 42.17.300/42.56.120. If the requestor cannot claim or review the records him or herself, a representative may do so within the thirty-day period. Other arrangements can be mutually agreed to between the requestor and the agency.

If a requestor fails to claim or review the records or an installment after the expiration of thirty days, an agency is authorized to stop assembling the remainder of the records or making copies. RCW 42.17.300/42.56.120. If the request is abandoned, the agency is no longer bound by the records retention requirements of the act prohibiting the scheduled destruction of a requested record. RCW 42.17.290/42.56.100.

If a requestor fails to claim or review the records or any installment of them within the thirty-day notification period, the agency may close the request and refile the records. If a requestor who has failed to claim or review the records then requests the same or almost identical records again, the agency, which has the flexibility to prioritize its responses to be most efficient to all requestors, can process the repeat request for the now-refiled records as a new request after other pending requests.

(2) **Time, place, and conditions for inspection.** Inspection should occur at a time mutually agreed (within reason) by the agency and requestor. An agency should not limit the time for inspection to times in which the requestor is unavailable. Requestors cannot dictate unusual times for inspection. The agency is only required to allow inspection during the agency's customary office hours. RCW 42.17.280/42.56.090. Often an agency will provide the records in a conference room or other office area.

The inspection of records cannot create "excessive interference" with the other "essential functions" of the agency. RCW 42.17.290/42.56.100. Similarly, copying records at

agency facilities cannot "unreasonably disrupt" the operations of the agency. RCW 42.17.270/42.56.080.

An agency may have an agency employee observe the inspection or copying of records by the requestor to ensure they are not destroyed or disorganized. RCW 42.17.290/42.56.100. A requestor cannot alter, mark on, or destroy an original record during inspection. To select a paper record for copying during an inspection, a requestor must use a nonpermanent method such as a removable adhesive note or paper clip.

Inspection times can be broken down into reasonable segments such as half days. However, inspection times cannot be broken down into unreasonable segments to either harass the agency or delay access to the timely inspection of records.

Note: [1]*See, e.g.*, WAC 296-06-120 (department of labor and industries provides thirty days to claim or review records).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04005, filed 1/31/06, effective 3/3/06.]

WAC 44-14-04006 Closing request and documenting compliance. (1) **Fulfilling request and closing letter.** A records request has been fulfilled and can be closed when a requestor has inspected all the requested records, all copies have been provided, a web link has been provided (with assistance from the agency in finding it, if necessary), an unclear request has not been clarified, a request or installment has not been claimed or reviewed, or the requestor cancels the request. An agency should provide a closing letter stating the scope of the request and memorializing the outcome of the request. A closing letter may not be necessary for smaller requests. The outcome described in the closing letter might be that the requestor inspected records, copies were provided (with the number range of the stamped or labeled records, if applicable), the agency sent the requestor the web link, the requestor failed to clarify the request, the requestor failed to claim or review the records within thirty days, or the requestor canceled the request. The closing letter should also ask the requestor to promptly contact the agency if he or she believes additional responsive records have not been provided.

(2) **Returning assembled records.** An agency is not required to keep assembled records set aside indefinitely. This would "unreasonably disrupt" the operations of the agency. RCW 42.17.270/42.56.080. After a request has been closed, an agency should return the assembled records to their original locations. Once returned, the records are no longer subject to the prohibition on destroying records scheduled for destruction under the agency's retention schedule. RCW 42.17.290/42.56.100.

(3) **Retain copy of records provided.** In some cases, it may be wise for the agency to keep a separate copy of the records it copied and provided in response to a request. This allows the agency to document what was provided. A growing number of requests are for a copy of the records provided to another requestor, which can easily be fulfilled if the agency retains a copy of the records provided to the first requestor. The copy of the records provided should be retained for a period of time consistent with the agency's retention schedules for records related to disclosure of documents.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04006, filed 1/31/06, effective 3/3/06.]

WAC 44-14-04007 Later-discovered records. An agency has no obligation to search for records responsive to a closed request. Sometimes an agency discovers responsive records after a request has been closed. An agency should provide the later-discovered records to the requestor.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04007, filed 1/31/06, effective 3/3/06.]

PROCESSING OF PUBLIC RECORDS REQUESTS—ELECTRONIC RECORDS

WAC 44-14-050 Processing of public records requests—Electronic records. (1) **Requesting electronic records.** The process for requesting electronic public records is the same as for requesting paper public records.

(2) **Providing electronic records.** When a requestor requests records in an electronic format, the public records officer will provide the nonexempt records or portions of such records that are reasonably locatable in an electronic format that is used by the agency and is generally commercially available, or in a format that is reasonably translatable from the format in which the agency keeps the record. Costs for providing electronic records are governed by WAC 44-14-07003.

(3) **Customized access to data bases.** With the consent of the requestor, the agency may provide customized access under RCW 43.105.280 if the record is not reasonably locatable or not reasonably translatable into the format requested. The (agency) may charge a fee consistent with RCW 43.105.280 for such customized access.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-050, filed 6/15/07, effective 7/16/07. Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-050, filed 1/31/06, effective 3/3/06.]

Comments to WAC 44-14-050

WAC 44-14-05001 Access to electronic records. The Public Records Act does not distinguish between paper and electronic records. Instead, the act explicitly includes electronic records within its coverage. The definition of "public record" includes a "writing," which in turn includes "existing data compilations from which information may be obtained or translated." RCW 42.17.020(48) (incorporated by reference into the act by RCW 42.56.010). Many agency records are now in an electronic format. Many of these electronic formats such as Windows® products are generally available and are designed to operate with other computers to quickly and efficiently locate and transfer information. Providing electronic records can be cheaper and easier for an agency than paper records. Furthermore, RCW 43.105.250 provides: "It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public." In general, an agency should provide electronic records

in an electronic format if requested in that format. Technical feasibility is the touchstone for providing electronic records. An agency should provide reasonably locatable electronic public records in either their original generally commercially available format (such as an Acrobat PDF® file) or, if the records are not in a generally commercially available format, the agency should provide them in a reasonably translatable electronic format if possible. In the rare cases when the requested electronic records are not reasonably locatable, or are not in a generally commercially available format or are not reasonably translatable into one, the agency might consider customized access. See WAC 44-14-05004. An agency may recover its actual costs for providing electronic records, which in many cases is de minimis. See WAC 44-14-050(3). What is technically feasible in one situation may not be in another. Not all agencies, especially smaller units of local government, have the electronic resources of larger agencies and some of the generalizations in these model rules may not apply every time. If an agency initially believes it cannot provide electronic records in an electronic format, it should confer with the requestor and the two parties should attempt to cooperatively resolve any technical difficulties. See WAC 44-14-05003. It is usually a purely technical question whether an agency can provide electronic records in a particular format in a specific case.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-05001, filed 6/15/07, effective 7/16/07.]

WAC 44-14-05002 "Reasonably locatable" and "reasonably translatable" electronic records. (1) **"Reasonably locatable" electronic records.** The act obligates an agency to provide nonexempt "identifiable...records." RCW 42.56.080. An "identifiable record" is essentially one that agency staff can "reasonably locate." WAC 44-14-04002(2). Therefore, a general summary of the "identifiable record" standard as it relates to electronically locating public records is that the act requires an agency to provide a nonexempt "reasonably locatable" record. This does not mean that an agency can decide if a request is "reasonable" and only fulfill those requests. Rather, "reasonably locatable" is a concept, grounded in the act, for analyzing electronic records issues.

In general, a "reasonably locatable" electronic record is one which can be located with typical search features and organizing methods contained in the agency's current software. For example, a retained e-mail containing the term "XYZ" is usually reasonably locatable by using the e-mail program search feature. However, an e-mail search feature has limitations, such as not searching attachments, but is a good starting point for the search. Information might be "reasonably locatable" by methods other than a search feature. For example, a request for a copy of all retained e-mails sent by a specific agency employee for a particular date is "reasonably locatable" because it can be found utilizing a common organizing feature of the agency's e-mail program, a chronological "sent" folder. Another indicator of what is "reasonably locatable" is whether the agency keeps the information in a particular way for its business purposes. For example, an agency might keep a data base of permit holders including the name of the business. The agency does not separate the businesses by whether they are publicly traded corporations or not because it has no reason to do so. A request for the names of the businesses which are publicly traded is not "reasonably locatable" because the agency has no business purpose for keeping the information that way. In such a case, the agency should provide the names of the businesses (assuming they are not exempt from disclosure) and the requestor can analyze the data base to determine which businesses are publicly traded corporations.

(2) **"Reasonably translatable" electronic records.** The act requires an agency to provide a "copy" of nonexempt records (subject to certain copying charges). RCW 42.56.070(1) and 42.56.080. To provide a photocopy of a paper record, an agency must take some reasonable steps to mechanically translate the agency's original document into a useable copy for the requestor such as copying it in a copying machine. Similarly, an agency must take some reasonable steps to prepare an electronic copy of an electronic record or a paper record. Providing an electronic copy is analogous to providing a paper record: An agency must take reasonable steps to translate the agency's original into a useable copy for the requestor.

The "reasonably translatable" concept typically operates in three kinds of situations:

(a) An agency has only a paper record;

(b) An agency has an electronic record in a generally commercially available format (such as a Windows® product); or

(c) An agency has an electronic record in an electronic format but the requestor seeks a copy in a different electronic format.

The following examples assume no redactions are necessary.

(i) **Agency has paper-only records.** When an agency only has a paper copy of a record, an example of a "reasonably translatable" copy would be scanning the record into an Adobe Acrobat PDF® file and providing it to the requestor. The agency could recover its actual cost for scanning. See WAC 44-14-07003. Providing a PDF copy of the record is analogous to making a paper copy. However, if the agency lacked a scanner (such as a small unit of local government), the record would not be "reasonably translatable" with the agency's own resources. In such a case, the agency could provide a paper copy to the requestor.

(ii) **Agency has electronic records in a generally commercially available format.** When an agency has an electronic record in a generally commercially available format, such as an Excel® spreadsheet, and the requestor requests an electronic copy in that format, no translation into another format is necessary; the agency should provide the spreadsheet electronically. Another example is where an agency has an electronic record in a generally commercially available format (such as Word®) and the requestor requests an electronic copy in Word®. An agency cannot instead provide a WordPerfect® copy because there is no need to translate the electronic record into a different format. In the paper-record context, this would be analogous to the agency intentionally making an unreadable photocopy when it could make a legible one. Similarly, the WordPerfect® "translation" by the agency is an attempt to hinder access to the record. In this example, the agency should provide the document in Word® format. Electronic records in generally commercially available formats such as Word® could be easily altered by the

requestor. Requestors should note that altering public records and then intentionally passing them off as exact copies of public records might violate various criminal and civil laws.

(iii) **Agency has electronic records in an electronic format other than the format requested.** When an agency has an electronic record in an electronic format (such as a Word® document) but the requestor seeks a copy in another format (such as WordPerfect®), the question is whether the agency's document is "reasonably translatable" into the requested format. If the format of the agency document allows it to "save as" another format without changing the substantive accuracy of the document, this would be "reasonably translatable." The agency's record might not translate perfectly, but it was the requestor who requested the record in a format other than the one used by the agency. Another example is where an agency has a data base in a unique format that is not generally commercially available. A requestor requests an electronic copy. The agency can convert the data in its unique system into a near-universal format such as a comma-delimited or tab-delimited format. The requestor can then convert the comma-delimited or tab-delimited data into a data base program (such as Access®) and use it. The data in this example is "reasonably translatable" into a comma-delimited or tab-delimited format so the agency should do so. A final example is where an agency has an electronic record in a generally commercially available format (such as Word®) but the requestor requests a copy in an obscure word processing format. The agency offers to provide the record in Word® format but the requestor refuses. The agency can easily convert the Word® document into a standard text file which, in turn, can be converted into most programs. The Word® document is "reasonably translatable" into a text file so the agency should do so. It is up to the requestor to convert the text file into his or her preferred format, but the agency has provided access to the electronic record in the most technically feasible way and not attempted to hinder the requestor's access to it.

(3) **Agency should keep an electronic copy of the electronic records it provides.** An electronic record is usually more susceptible to manipulation and alteration than a paper record. Therefore, an agency should keep, when feasible, an electronic copy of the electronic records it provides to a requestor to show the exact records it provided. Additionally, an electronic copy might also be helpful when responding to subsequent electronic records requests for the same records.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-05002, filed 6/15/07, effective 7/16/07.]

WAC 44-14-05003 Parties should confer on technical issues. Technical feasibility can vary from request to request. When a request for electronic records involves technical issues, the best approach is for both parties to confer and cooperatively resolve them. Often a telephone conference will be sufficient. This approach is consistent with the requirement that agencies provide the "fullest assistance" to a requestor. RCW 42.56.100 and WAC 44-14-04003(2). Furthermore, if a requestor files an enforcement action under the act to obtain the records, the burden of proof is on the agency to justify its refusal to provide the records. RCW 42.56.550(1). If the requestor articulates a reasonable technical alternative to the agency's refusal to provide the records electronically or in the requested format, and the agency never offered to confer with the requestor, the agency will have difficulty proving that its refusal was justified.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-05003, filed 6/15/07, effective 7/16/07.]

WAC 44-14-05004 Customized access. When locating the requested records or translating them into the requested format cannot be done without specialized programming, RCW 43.105.280 allows agencies to charge some fees for "customized access." The statute provides: "Agencies should not offer customized electronic access services as the primary way of responding to requests or as a primary source of revenue." Most public records requests for electronic records can be fulfilled based on the "reasonably locatable" and "reasonably translatable" standards. Resorting to customized access should not be the norm. An example of where "customized access" would be appropriate is if a state agency's old computer system stored data in a manner in which it was impossible to extract the data into comma-delimited or tab-delimited formats, but rather required a programmer to spend more than a nominal amount of time to write computer code specifically to extract it. Before resorting to customized access, the agency should confer with the requestor to determine if a technical solution exists not requiring the specialized programming.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-05004, filed 6/15/07, effective 7/16/07.]

WAC 44-14-05005 Relationship of Public Records Act to court rules on discovery of "electronically stored information." The December 2006 amendments to the Federal Rules of Civil Procedure provide guidance to parties in litigation on their respective obligations to provide access to, or produce, "electronically stored information." See Federal Rules of Civil Procedure 26 and 34. The obligations of state and local agencies under those federal rules (and under any state-imposed rules or procedures that adopt the federal rules) to search for and provide electronic records may be different, and in some instances more demanding, than those required under the Public Records Act. The federal discovery rules and the Public Records Act are two separate laws imposing different standards. However, sometimes requestors make public records requests to obtain evidence that later may be used in non-Public Records Act litigation against the agency providing the records. Therefore, it may be prudent for agencies to consult with their attorneys regarding best practices of retaining copies of the records provided under the act so there can be no question later of what was and what was not produced in response to the request in the event that electronic records, or records derived from them, become issues in court.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-05005, filed 6/15/07, effective 7/16/07.]

EXEMPTIONS

WAC 44-14-060 Exemptions. (1) The Public Records Act provides that a number of types of documents are exempt from public inspection and copying. In addition, documents

are exempt from disclosure if any "other statute" exempts or prohibits disclosure. Requestors should be aware of the following exemptions, outside the Public Records Act, that restrict the availability of some documents held by (name of agency) for inspection and copying:

(List other laws)

(2) The (agency) is prohibited by statute from disclosing lists of individuals for commercial purposes.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-060, filed 1/31/06, effective 3/3/06.]

Comments to WAC 44-14-060

WAC 44-14-06001 Agency must publish list of applicable exemptions. An agency must publish and maintain a list of the "other statute" exemptions from disclosure (that is, those exemptions found outside the Public Records Act) that it believes potentially exempt records it holds from disclosure. RCW 42.17.260(2)/42.56.070(2). The list is "for informational purposes" only and an agency's failure to list an exemption "shall not affect the efficacy of any exemption." RCW 42.17.260(2)/42.56.070(2). A list of possible "other statute" exemptions is posted on the web site of the Municipal Research Service Center at www.mrsc.org/Publications/prdpub04.pdf (scroll to Appendix C).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-06001, filed 1/31/06, effective 3/3/06.]

WAC 44-14-06002 Summary of exemptions. (1) **General.** The act and other statutes contain hundreds of exemptions from disclosure and dozens of court cases interpret them. A full treatment of all exemptions is beyond the scope of the model rules. Instead, these comments to the model rules provide general guidance on exemptions and summarize a few of the most frequently invoked exemptions. However, the scope of exemptions is determined exclusively by statute and case law; the comments to the model rules merely provide guidance on a few of the most common issues.

An exemption from disclosure will be narrowly construed in favor of disclosure. RCW 42.17.251/42.56.030. An exemption from disclosure must specifically exempt a record or portion of a record from disclosure. RCW 42.17.260(1)/42.56.070(1). An exemption will not be inferred.[1]

An agency cannot define the scope of a statutory exemption through rule making or policy.[2] An agency agreement or promise not to disclose a record cannot make a disclosable record exempt from disclosure. RCW 42.17.260(1)/42.56.070(1).[3] Any agency contract regarding the disclosure of records should recite that the act controls.

An agency must describe why each withheld record or redacted portion of a record is exempt from disclosure. RCW 42.17.310(4)/42.56.210(4). One way to describe why a record was withheld or redacted is by using a withholding index.

After invoking an exemption in its response, an agency may revise its original claim of exemption in a response to a motion to show cause.[4]

Exemptions are "permissive rather than mandatory." Op. Att'y Gen. 1 (1980), at 5. Therefore, an agency has the discretion to provide an exempt record. However, in contrast to a waivable "exemption," an agency cannot provide a record when a statute makes it "confidential" or otherwise prohibits disclosure. For example, the Health Care Information Act generally prohibits the disclosure of medical information without the patient's consent. RCW 70.02.020(1). If a statute classifies information as "confidential" or otherwise prohibits disclosure, an agency has no discretion to release a record or the confidential portion of it.[5] Some statutes provide civil and criminal penalties for the release of particular "confidential" records. See RCW 82.32.330(5) (release of certain state tax information a misdemeanor).

(2) **"Privacy" exemption.** There is no general "privacy" exemption. Op. Att'y Gen. 12 (1988).[6] However, a few specific exemptions incorporate privacy as one of the elements of the exemption. For example, personal information in agency employee files is exempt to the extent that disclosure would violate the employee's right to "privacy." RCW 42.17.310 (1)(b)/42.56.210 (1)(b). "Privacy" is then one of the elements, in addition to the others in RCW 42.17.310 (1)(b)/42.56.210 (1)(b), that an agency or a third party resisting disclosure must prove.

"Privacy" is defined in RCW 42.17.255/42.56.050 as the disclosure of information that "(1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." This is a two-part test requiring the party seeking to prevent disclosure to prove both elements.[7]

Because "privacy" is not a stand-alone exemption, an agency cannot claim RCW 42.17.255/42.56.050 as an exemption.[8]

(3) **Attorney-client privilege.** The attorney-client privilege statute, RCW 5.60.060 (2)(a), is an "other statute" exemption from disclosure.[9] In addition, RCW 42.17.310 (1)(j)/42.56.210 (1)(j) exempts attorney work-product involving a "controversy," which means completed, existing, or reasonably anticipated litigation involving the agency.[10] The exact boundaries of the attorney-client privilege and work-product doctrine is beyond the scope of these comments. However, in general, the attorney-client privilege covers records reflecting communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties and an attorney serving in the capacity of legal advisor for the purpose of rendering or obtaining legal advice, and records prepared by the attorney in furtherance of the rendition of legal advice. The attorney-client privilege does not exempt records merely because they reflect communications in meetings where legal counsel was present or because a record or copy of a record was provided to legal counsel if the other elements of the privilege are not met.[11] A guidance document prepared by the attorney general's office on the attorney-client privilege and work-product doctrine is available at www.atg.wa.gov/records/modelrules.

(4) **Deliberative process exemption.** RCW 42.17.310 (1)(i)/42.56.210 (1)(i) exempts "Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended" except if the record is cited by the agency.

In order to rely on this exemption, an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative

process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based.[12] Courts have held that this exemption is "severely limited" by its purpose, which is to protect the free flow of opinions by policy makers.[13] It applies only to those portions of a record containing recommendations, opinions, and proposed policies; it does not apply to factual data contained in the record.[14] The exemption does not apply to records or portions of records concerning the implementation of policy or the factual basis for the policy.[15] The exemption does not apply merely because a record is called a "draft" or stamped "draft." Recommendations that are actually implemented lose their protection from disclosure after they have been adopted by the agency.[16]

(5) **"Overbroad" exemption.** There is no "overbroad" exemption. RCW 42.17.270/42.56.080. See WAC 44-14-04002(3).

(6) **Commercial use exemption.** The act does not allow an agency to provide access to "lists of individuals requested for commercial purposes." RCW 42.17.260(9)/42.56.070(9). An agency may require a requestor to sign a declaration that he or she will not put a list of individuals in the record to use for a commercial purpose.[17] This authority is limited to a list of individuals, not a list of companies.[18] A requestor who signs a declaration promising not to use a list of individuals for a commercial purpose, but who then violates this declaration, could arguably be charged with the crime of false swearing. RCW 9A.72.040.[19]

(7) **Trade secrets.** Many agencies hold sensitive proprietary information of businesses they regulate. For example, an agency might require an applicant for a regulatory approval to submit designs for a product it produces. A record is exempt from disclosure if it constitutes a "trade secret" under the Uniform Trade Secrets Act, chapter 19.108 RCW.[20] However, the definition of a "trade secret" can be very complex and often the facts showing why the record is or is not a trade secret are only known by the potential holder of the trade secret who submitted the record in question.

When an agency receives a request for a record that might be a trade secret, often it does not have enough information to determine whether the record arguably qualifies as a "trade secret." An agency is allowed additional time under the act to determine if an exemption might apply. RCW 42.17.320/42.56.520.

When an agency cannot determine whether a requested record contains a "trade secret," usually it should communicate with the requestor that the agency is providing the potential holder of the trade secret an opportunity to object to the disclosure. The agency should then contact the potential holder of the trade secret in question and state that the record will be released in a certain amount of time unless the holder files a court action seeking an injunction prohibiting the agency from disclosing the record under RCW 42.17.330/42.56.540. Alternatively, the agency can ask the potential holder of the trade secret for an explanation of why it contends the record is a trade secret, and state that if the record is not a trade secret or otherwise exempt from disclosure that the agency intends to release it. The agency should inform the potential holder of a trade secret that its explanation will be shared with the requestor. The explanation can assist the agency in determining whether it will claim the trade secret exemption. If the agency concludes that the record is arguably not exempt, it should provide a notice of intent to disclose unless the potential holder of the trade secret obtains an injunction preventing disclosure under RCW 42.17.330/42.56.540.

As a general matter, many agencies do not assert the trade secret exemption on behalf of the potential holder of the trade secret but rather allow the potential holder to seek an injunction.

Notes:

[1] *Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) ("*PAWS II*").

[2] *Servais v. Port of Bellingham*, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995).

[3] *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 40, 769 P.2d 283 (1989); *Van Buren v. Miller*, 22 Wn. App. 836, 845, 592 P.2d 671, *review denied*, 92 Wn.2d 1021 (1979).

[4] *PAWS II*, 125 Wn.2d at 253.

[5] Op. Att'y Gen. 7 (1986).

[6] *See* RCW 42.17.255/42.56.050 ("privacy" linked to rights of privacy "specified in (the act) as express exemptions").

[7] *King County v. Sheehan*, 114 Wn. App. 325, 344, 57 P.3d 307 (2002).

[8] Op. Att'y Gen. 12 (1988), at 3 ("The legislature clearly repudiated the notion that agencies could withhold records based solely on general concerns about privacy.").

[9] *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004).

[10] *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993).

[11] This summary comes from the attorney general's proposed definition of the privilege in the first version of House Bill No. 1758 (2005).

[12] *PAWS II*, 125 Wn.2d at 256.

[13] *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 133, 580 P.2d 246 (1978); *PAWS II*, 125 Wn.2d at 256.

[14] *PAWS II*, 125 Wn.2d at 256.

[15] *Cowles Pub. Co. v. City of Spokane*, 69 Wn. App. 678, 685, 849 P.2d 1271 (1993).

[16] *Dawson*, 120 Wn.2d at 793.

[17] Op. Att'y Gen. 12 (1988). However, a list of individuals applying for professional licensing or examination may be provided to professional associations recognized by the licensing or examination board. RCW 42.17.260(9)/42.56.070(9).

[18] Op. Att'y Gen. 2 (1998).

[19] RCW 9A.72.040 provides: "(1) A person is guilty of false swearing if he makes a false statement, which he knows to be false, under an oath required or authorized by law. (2) False swearing is a gross misdemeanor." RCW 42.17.270/42.56.080 authorizes an agency to determine if a requestor will use a list of individuals for commercial purpose. *See* Op. Att'y Gen. 12 (1988), at 10-11 (agency could require requestor to sign affidavit of noncommercial use).

[20] *PAWS II*, 125 Wn.2d at 262.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-06002, filed 1/31/06, effective 3/3/06.]

COSTS OF PROVIDING COPIES OF PUBLIC RECORDS

WAC 44-14-070 Costs of providing copies of public records. (1) **Costs for paper copies.** There is no fee for inspecting public records. A requestor may obtain standard

black and white photocopies for (amount) cents per page and color copies for (amount) cents per page.

(If agency decides to charge more than fifteen cents per page, use the following language:) The (name of agency) charges (amount) per page for a standard black and white photocopy of a record selected by a requestor. A statement of the factors and the manner used to determine this charge is available from the public records officer.

Before beginning to make the copies, the public records officer or designee may require a deposit of up to ten percent of the estimated costs of copying all the records selected by the requestor. The public records officer or designee may also require the payment of the remainder of the copying costs before providing all the records, or the payment of the costs of copying an installment before providing that installment. The (name of agency) will not charge sales tax when it makes copies of public records.

(2) **Costs for electronic records.** The cost of electronic copies of records shall be (amount) for information on a CD-ROM. (If the agency has scanning equipment at its offices: The cost of scanning existing (agency) paper or other non-electronic records is (amount) per page.) There will be no charge for e-mailing electronic records to a requestor, unless another cost applies such as a scanning fee.

(3) **Costs of mailing.** The (name of agency) may also charge actual costs of mailing, including the cost of the shipping container.

(4) **Payment.** Payment may be made by cash, check, or money order to the (name of agency).

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-070, filed 6/15/07, effective 7/16/07. Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-070, filed 1/31/06, effective 3/3/06.]

Comments to WAC 44-14-070

WAC 44-14-07001 General rules for charging for copies. (1) **No fees for costs of inspection.** An agency cannot charge a fee for locating public records or for preparing the records for inspection or copying. RCW 42.17.300/42.56.120.[1] An agency cannot charge a "redaction fee" for the staff time necessary to prepare the records for inspection, for the copying required to redact records before they are inspected, or an archive fee for getting the records from off-site. Op. Att'y Gen. 6 (1991). These are the costs of making the records available for inspection or copying and cannot be charged to the requestor.

(2) **Standard photocopy charges.** Standard photocopies are black and white 8x11 paper copies. An agency can choose to calculate its copying charges for standard photocopies or to opt for a default copying charge of no more than fifteen cents per page.

If it attempts to charge more than the fifteen cents per page maximum for photocopies, an agency must establish a statement of the "actual cost" of the copies it provides, which must include a "statement of the factors and the manner used to the determine the actual per page cost." RCW 42.17.260(7)/42.56.070(7). An agency may include the costs "directly incident" to providing the copies such as paper, copying equipment, and staff time to make the copies. RCW 42.17.260 (7)(a)/42.56.070 (7)(a).[2] An agency failing to properly establish a copying charge in excess of the default fifteen cents per page maximum is limited to the default amount. RCW 42.17.260 (7)(a) and (b)/42.56.070 (7)(a) and (b) and 42.17.300/42.56.120.

If it charges more than the default rate of fifteen cents per page, an agency must provide its calculations and the reasoning for its charges. RCW 42.17.260(7)/42.56.070(7) and 42.17.300/42.56.120.[3] A price list with no analysis is insufficient. An agency's calculations and reasoning need not be elaborate but should be detailed enough to allow a requestor or court to determine if the agency has properly calculated its copying charges. An agency should generally compare its copying charges to those of commercial copying centers.

If an agency opts for the default copying charge of fifteen cents per page, it need not calculate its actual costs. RCW 42.17.260(8)/42.56.070(8).

(3) **Charges for copies other than standard photocopies.** Nonstandard copies include color copies, engineering drawings, and photographs. An agency can charge its actual costs for nonstandard photocopies. RCW 42.17.300/42.56.120. For example, when an agency provides records in an electronic format by putting the records on a disk, it may charge its actual costs for the disk. The agency can provide a requestor with documentation for its actual costs by providing a catalog or price list from a vendor.

(4) **Copying charges apply to copies selected by requestor.** Often a requestor will seek to inspect a large number of records but only select a smaller group of them for copying. Copy charges can only be charged for the records selected by the requestor. RCW 42.17.300/42.56.120 (charges allowed for "providing" copies to requestor).

The requestor should specify whether he or she seeks inspection or copying. The agency should inform the requestor that inspection is free. This can be noted on the agency's request form. If the requestor seeks copies, then the agency should inform the requestor of the copying charges for the request. An agency should not assemble a large number of records, fail to inform the requestor that inspection is free, and then attempt to charge for copying all the records.

Sometimes a requestor will choose to pay for the copying of a large batch of records without inspecting them. This is allowed, provided that the requestor is informed that inspection is free. Informing the requestor on a request form that inspection is free is sufficient.

(5) **Use of outside vendor.** An agency is not required to copy records at its own facilities. An agency can send the project to a commercial copying center and bill the requestor for the amount charged by the vendor. An agency is encouraged to do so when an outside vendor can make copies more quickly and less expensively than an agency. An agency can arrange with the requestor for him or her to pay the vendor directly. An agency cannot charge the default fifteen cents per page rate when its "actual cost" at a copying vendor is less. The default rate is only for agency-produced copies. RCW 42.17.300/42.56.120.

(6) **Sales tax.** An agency cannot charge sales tax on copies it makes at its own facilities. RCW 82.12.02525.

(7) **Costs of mailing.** If a requestor asks an agency to mail copies, the agency may charge for the actual cost of postage and the shipping container (such as an envelope). RCW 42.17.260 (7)(a)/42.56.070 (7)(a).

Notes: [1]*See also* Op. Att'y Gen. 6 (1991).

[2]The costs of staff time is allowed only for making copies. An agency cannot charge for staff time for locating records or other noncopying functions. *See* RCW 42.17.300/42.56.120 ("No fee shall be charged for locating public documents and making them available for copying.").

[3]*See also* Op. Att'y Gen. 6 (1991) (agency must "justify" its copy charges).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-07001, filed 1/31/06, effective 3/3/06.]

WAC 44-14-07003 Charges for electronic records. Providing copies of electronic records usually costs the agency and requestor less than making paper copies. Agencies are strongly encouraged to provide copies of electronic records in an electronic format. See RCW 43.105.250 (encouraging state and local agencies to make "public records widely available electronically to the public."). As with charges for paper copies, "actual cost" is the primary factor for charging for electronic records. In many cases, the "actual cost" of providing an existing electronic record is de minimis. For example, a requestor requests an agency to e-mail an existing Excel® spreadsheet. The agency should not charge for the de minimis cost of electronically copying and e-mailing the existing spreadsheet. The agency cannot attempt to charge a per-page amount for a paper copy when it has an electronic copy that can be easily provided at nearly no cost. However, if the agency has a paper-only copy of a record and the requestor requests an Adobe Acrobat PDF® copy, the agency incurs an actual cost in scanning the record (if the agency has a scanner at its offices). Therefore, an agency can establish a scanning fee for records it scans. Agencies are encouraged to compare their scanning and other copying charges to the rates of outside vendors. See WAC 44-14-07001.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-07003, filed 6/15/07, effective 7/16/07. Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-07003, filed 1/31/06, effective 3/3/06.]

WAC 44-14-07004 Other statutes govern copying of particular records. The act generally governs copying charges for public records, but several specific statutes govern charges for particular kinds of records. RCW 42.17.305/42.56.130. The following nonexhaustive list provides some examples: RCW 46.52.085 (charges for traffic accident reports), RCW 10.97.100 (copies of criminal histories), RCW 3.62.060 and 3.62.065 (charges for certain records of municipal courts), and RCW 70.58.107 (charges for birth certificates).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-07004, filed 1/31/06, effective 3/3/06.]

WAC 44-14-07005 Waiver of copying charges. An agency has the discretion to waive copying charges. For administrative convenience, many agencies waive copying charges for small requests. For example, the attorney general's office does not charge copying fees if the request is for twenty-five or fewer standard photocopies.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-07005, filed 1/31/06, effective 3/3/06.]

WAC 44-14-07006 Requiring partial payment. (1) **Copying deposit.** An agency may charge a deposit of up to ten percent of the estimated copying costs of an entire request before beginning to copy the records. RCW 42.17.300/42.56.120.[1] The estimate must be reasonable. An agency can require the payment of the deposit before copying an installment of the records or the entire request. The deposit applies to the records selected for copying by the requestor, not all the records made available for inspection. An agency is not required to charge a deposit. An agency might find a deposit burdensome for small requests where the deposit might be only a few dollars. Any unused deposit must be refunded to the requestor.

When copying is completed, the agency can require the payment of the remainder of the copying charges before providing the records. For example, a requestor makes a request for records that comprise one box of paper documents. The requestor selects the entire box for copying. The agency estimates that the box contains three thousand pages of records. The agency charges ten cents per page so the cost would be three hundred dollars. The agency obtains a ten percent deposit of thirty dollars and then begins to copy the records. The total number of pages turns out to be two thousand nine hundred so the total cost is two hundred ninety dollars. The thirty dollar deposit is credited to the two hundred ninety dollars. The agency requires payment of the remaining two hundred sixty dollars before providing the records to the requestor.

(2) **Copying charges for each installment.** If an agency provides records in installments, the agency may charge and collect all applicable copying fees (not just the ten percent deposit) for each installment. RCW 42.17.300/42.56.120. The agency may agree to provide an installment without first receiving payment for that installment.

Note: [1]*See* RCW 42.17.300/42.56.120 (ten percent deposit for "a request").

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-07006, filed 1/31/06, effective 3/3/06.]

REVIEW OF DENIALS OF PUBLIC RECORDS

WAC 44-14-080 Review of denials of public records. (1) **Petition for internal administrative review of denial of access.** Any person who objects to the initial denial or partial denial of a records request may petition in writing (including e-mail) to the public records officer for a review of that decision. The petition shall include a copy of or reasonably identify the written statement by the public records officer or designee denying the request.

(2) **Consideration of petition for review.** The public records officer shall promptly provide the petition and any other relevant information to (public records officer's supervisor or other agency official designated by the agency to conduct the review). That person will immediately consider the petition and either affirm or reverse the denial within two business days following the (agency's) receipt of the petition, or within such other time as (name of agency) and the requestor mutually agree to.

(3) **(Applicable to state agencies only.) Review by the attorney general's office.** Pursuant to RCW 42.17.325/42.56.530, if the (name of state agency) denies a

requestor access to public records because it claims the record is exempt in whole or in part from disclosure, the requestor may request the attorney general's office to review the matter. The attorney general has adopted rules on such requests in WAC 44-06-160.

(4) **Judicial review.** Any person may obtain court review of denials of public records requests pursuant to RCW 42.17.340/42.56.550 at the conclusion of two business days after the initial denial regardless of any internal administrative appeal.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-080, filed 1/31/06, effective 3/3/06.]

Comments to WAC 44-14-080

WAC 44-14-08001 Agency internal procedure for review of denials of requests. The act requires an agency to "establish mechanisms for the most prompt possible review of decisions denying" records requests. RCW 42.17.320/42.56.520. An agency internal review of a denial need not be elaborate. It could be reviewed by the public records officer's supervisor, or other person designated by the agency. The act deems agency review to be complete two business days after the initial denial, after which the requestor may obtain judicial review. Large requests or requests involving many redactions may take longer than two business days for the agency to review. In such a case, the requestor could agree to a longer internal review period.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-08001, filed 1/31/06, effective 3/3/06.]

WAC 44-14-08002 Attorney general's office review of denials by state agencies. The attorney general's office is authorized to review a state agency's claim of exemption and provide a written opinion. RCW 42.17.325/42.56.530. This only applies to state agencies and a claim of exemption. See WAC 44-06-160. A requestor may initiate such a review by sending a request for review to Public Records Review, Office of the Attorney General, P.O. Box 40100, Olympia, Washington 98504-0100 or publicrecords@atg.wa.gov.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-08002, filed 1/31/06, effective 3/3/06.]

WAC 44-14-08003 Alternative dispute resolution. Requestors and agencies are encouraged to resolve public records disputes through alternative dispute resolution mechanisms such as mediation and arbitration. No mechanisms for formal alternative dispute resolution currently exist in the act but parties are encouraged to resolve their disputes without litigation.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-08003, filed 1/31/06, effective 3/3/06.]

WAC 44-14-08004 Judicial review. (1) **Seeking judicial review.** The act provides that an agency's decision to deny a request is final for purposes of judicial review two business days after the initial denial of the request. RCW 42.17.320/42.56.520.[1] Therefore, the statute allows a requestor to seek judicial review two business days after the initial denial whether or not he or she has exhausted the internal agency review process.[2] An agency should not have an internal review process that implies that a requestor cannot seek judicial review until internal reviews are complete because RCW 42.17.320/42.56.520 allows judicial review two business days after the initial denial.

The act provides a speedy remedy for a requestor to obtain a court hearing on whether the agency has violated the act. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2). The purpose of the quick judicial procedure is to allow requestors to expeditiously find out if they are entitled to obtain public records.[3] To speed up the court process, a public records case may be decided merely on the "motion" of a requestor and "solely on affidavits." RCW 42.17.340 (1) and (3)/42.56.550 (1) and (3).

(2) **Statute of limitations.** The statute of limitations for an action under the act is one year after the agency's claim of exemption or the last production of a record on a partial or installment basis. RCW 42.17.340(6)/42.56.550(6).

(3) **Procedure.** To initiate court review of a public records case, a requestor can file a "motion to show cause" which directs the agency to appear before the court and show any cause why the agency did not violate the act. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2).[4] The case must be filed in the superior court in the county in which the record is maintained. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2). In a case against a county, the case may be filed in the superior court of that county, or in the superior court of either of the two nearest adjoining counties. RCW 42.17.340(5)/42.56.550(5). The show-cause procedure is designed so that a nonattorney requestor can obtain judicial review himself or herself without hiring an attorney. A requestor can file a motion for summary judgment to adjudicate the case.[5] However, most cases are decided on a motion to show cause.[6]

(4) **Burden of proof.** The burden is on an agency to demonstrate that it complied with the act. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2).

(5) **Types of cases subject to judicial review.** The act provides three mechanisms for court review of a public records dispute.

(a) **Denial of record.** The first kind of judicial review is when a requestor's request has been denied by an agency. RCW 42.17.340(1)/42.56.550(1). This is the most common kind of case.

(b) **"Reasonable estimate."** The second form of judicial review is when a requestor challenges an agency's "reasonable estimate" of the time to provide a full response. RCW 42.17.340(2)/42.56.550(2).

(c) **Injunctive action to prevent disclosure.** The third mechanism of judicial review is an injunctive action to restrain the disclosure of public records. RCW 42.17.330/42.56.540. An action under this statute can be initiated by the agency, a person named in the disputed record, or a person to whom the record "specifically pertains." The party seeking to prevent disclosure has the burden of proving the record is exempt from disclosure.[7] The party seeking to prevent disclosure must prove both the necessary elements of an injunction and that a specific exemption prevents disclosure.[8]

(6) **"In camera" review by court.** The act authorizes a court to review withheld records or portions of records "in camera." RCW 42.17.340(3)/42.56.550(3). "In camera"

means a confidential review by the judge alone in his or her chambers. Courts are encouraged to conduct an in camera review because it is often the only way to determine if an exemption has been properly claimed.[9]

An agency should prepare an in camera index of each withheld record or portion of a record to assist the judge's in camera review. This is a second index, in addition to a withholding index provided to the requestor. The in camera index should number each withheld record or redacted portion of the record, provide the unredacted record or portion to the judge with a reference to the index number, and provide a brief explanation of each claimed exemption corresponding to the numbering system. The agency's brief explanation should not be as detailed as a legal brief because the opposing party will not have an opportunity to review it and respond. The agency's legal briefing should be done in the normal course of pleadings, with the opposing party having an opportunity to respond.

The in camera index and disputed records or unredacted portions of records should be filed under seal. The judge should explain his or her ruling on each withheld record or redacted portion by referring to the numbering system in the in camera index. If the trial court's decision is appealed, the in camera index and its attachments should be made part of the record on appeal and filed under seal in the appellate court.

(7) **Attorneys' fees, costs, and penalties to prevailing requestor.** The act requires an agency to pay a prevailing requestor's reasonable attorneys' fees, costs, and a daily penalty. RCW 42.17.340(4)/42.56.550(4). Only a requestor can be awarded attorneys' fees, costs, or a daily penalty under the act; an agency or a third party resisting disclosure cannot.[10] A requestor is the "prevailing" party when he or she obtains a judgment in his or her favor, the suit was reasonably necessary to obtain the record, or a wrongfully withheld record was provided for another reason.[11] In an injunctive action under RCW 42.17.330/42.56.540, the prevailing requestor cannot be awarded attorneys' fees, costs, or a daily penalty against an agency if the agency took the position that the record was subject to disclosure.[12]

The purpose of the act's attorneys' fees, costs, and daily penalty provisions is to reimburse the requestor for vindicating the public's right to obtain public records, to make it financially feasible for requestors to do so, and to deter agencies from improperly withholding records.[13] However, a court is only authorized to award "reasonable" attorneys' fees. RCW 42.17.340(4)/42.56.550(4). A court has discretion to award attorneys' fees based on an assessment of reasonable hourly rates and which work was necessary to obtain the favorable result.[14]

The award of "costs" under the act is for all of a requestor's nonattorney-fee costs and is broader than the court costs awarded to prevailing parties in other kinds of cases.[15]

A daily penalty of between five dollars to one hundred dollars must be awarded to a prevailing requestor, regardless of an agency's "good faith."[16] An agency's "bad faith" can warrant a penalty on the higher end of this scale.[17] The penalty is per day, not per-record per-day.[18]

Notes:

[1] *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) ("*PAWS II*") (RCW 42.17.320/42.56.520 "provides that, regardless of internal review, initial decisions become final for purposes of judicial review after two business days.").

[2] *See, e.g.*, WAC 44-06-120 (attorney general's office internal review procedure specifying that review is final when the agency renders a decision on the appeal, or the close of the second business day after it receives the appeal, "whichever occurs first").

[3] *Spokane Research & Def. Fund v. City of Spokane*, 121 Wn. App. 584, 591, 89 P.3d 319 (2004), *reversed on other grounds*, 155 Wn.2d 89, 117 P.3d 1117 (2005) ("The purpose of the PDA is to ensure speedy disclosure of public records. The statute sets forth a simple procedure to achieve this.").

[4] *See generally Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005).

[5] *Id.* at 106.

[6] *Wood v. Thurston County*, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003).

[7] *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 735, 744, 958 P.2d 260 (1998).

[8] *PAWS II*, 125 Wn.2d at 257-58.

[9] *Spokane Research & Def. Fund v. City of Spokane*, 96 Wn. App. 568, 577 & 588, 983 P.2d 676 (1999), *review denied*, 140 Wn.2d 1001, 999 P.2d 1259 (2000).

[10] RCW 42.17.340(4)/42.56.550(4) (providing award only for "person" prevailing against "agency"); *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691-92, 13 P.3d 1104 (2000) (third party resisting disclosure not entitled to award).

[11] *Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, 59 P.3d 109 (2002); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 104, 117 P.3d 1117 (2005).

[12] *Confederated Tribes*, 135 Wn.2d at 757.

[13] *Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999) ("*ACLU II*") ("permitting a liberal recovery of costs is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access to public records.").

[14] *Id.* at 118.

[15] *Id.* at 115.

[16] *American Civil Liberties Union v. Blaine School Dist. No. 503*, 86 Wn. App. 688, 698-99, 937 P.2d 1176 (1997) ("*ACLU I*").

[17] *Id.*

[18] *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-08004, filed 1/31/06, effective 3/3/06.]