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No. 93562-9

SUPREME COURT OF
THE STATE OF WASHINGTON

KITTITAS COUNTY,

Respondent,

v.

SKY ALLPHIN, et al.,

Petitioners,

**KITTITAS COUNTY'S ANSWER TO BRIEF
OF AMICI CURIAE WASHINGTON COALITION FOR OPEN
GOVERNMENT, AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON, AND THE SPOKESMAN-REVIEW**

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TABLE OF CONTENTS

	Page
Table of Authorities.....	ii-iv
I. INTRODUCTION.....	1
II. ARGUMENT.....	1
A. Summary of response.....	1
B. The concept of a "legal team" is not part of the law of attorney work product.....	2
C. The attorney work product doctrine is incorporated into the PRA's controversy exemption just as it exists in the ordinary civil discovery context.....	3
D. This Court has previously considered, but rejected, a dual construction of privilege law for PRA purposes and ordinary civil litigation purposes.....	5
1. The practical negative effects of a dual construction of privilege law would be considerable.....	6
2. The text of the PRA does not require a dual construction of privilege law.....	8
E. Amici's argument on the common interest doctrine incorrectly implies the necessity of a formal joint defense agreement.....	11
III. CONCLUSION.....	17

TABLE OF AUTHORITIES

WASHINGTON CASES

	Page
<i>ABC Holdings, Inc. v. Kittitas County</i> , 187 Wn. App. 275, 348 P.3d 1222 (2015).....	8
<i>Jewels v. City of Bellingham</i> , 183 Wn.2d 388, 353 P.3d 204 (2015).....	8, 9
<i>Limstrom v. Ladenburg</i> , 136 Wn.2d 595, 963 P.2d 869 (1998).....	4, 5
<i>O'Connor v. Dep't of Soc. & Health Serv.</i> , 143 Wn.2d 895, 25 P.3d 426 (2001).....	4, 5, 6, 9
<i>Rental Housing Ass'n of Puget Sound v. City of Des Moines</i> , 165 Wn.2d 525, 199 P.3d 393 (2009).....	6
<i>Sanders v. State</i> , 169 Wn.2d 827, 240 P.3d 120 (2010).....	4, 10, 11, 16
<i>Soter v. Cowles Pub. Co.</i> , 162 Wn.2d 716, 174 P.3d 60 (2007).....	2, 10
<i>State v. Burden</i> , 120 Wn.2d 371, 841 P.2d 758 (1992).....	9

OTHER CASES

<i>Avocent Redmond Corp. v. Rose Electronics, Inc.</i> , 516 F. Supp. 2d 1199 (W.D. Wash. 2007).....	12, 13, 14
<i>Caremark, Inc. v. Affiliated Computer Services, Inc.</i> , 195 F.R.D. 610 (N.D. Ill. 2000).....	3
<i>Continental Oil Co. v. U.S.</i> , 330 F.3d 347 (9 th Cir. 1964).....	15

<i>Hickman v. Taylor</i> , 329 U.S. 495 (1947).....	4
<i>Hunydee v. United States</i> , 355 F.2d 183 (9 th Cir. 1965).....	13, 15
<i>In re Pacific Pictures Corp.</i> , 679 F.3d 1121 (9 th Cir. 2012).....	12, 14
<i>O’Boyle v. Borough of Long Port</i> , 218 N.J. 168 (2014), 94 A.3d 299 (2014).....	15
<i>Robert Bosch LLC v. Pylon Mfg. Corp.</i> , 263 F.R.D. 142 (D. Del. 2009).....	16
<i>Upjohn Co. v. United States</i> , 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).....	7
<i>U.S. v. Gonzales</i> , 669 F.3d 974 (9 th Cir. 2012).....	15

RULES

CR 26(b)(4).....	3, 4, 7, 9
CrR 4.7(f)(1).....	4
Fed. R. Civ. P. 26(b)(3).....	4

STATUTES

RCW 42.56.030.....	2
--------------------	---

PUBLICATIONS

Lewis H. Orland, <i>Observations on the Work Product Rule</i> , 29 Gonz. L. Rev. 281 (1994).....	3
---	---

Katharine T. Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*,
15 B.U. Pub. Int. L.J. 49 (2005)..... 16

I. INTRODUCTION

The Washington Coalition for Open Government, the American Civil Liberties Union, and the Spokesman-Review dispute whether there was any County-Ecology "legal team" in this case. The legal team concept and the use of that phrase originated with the trial court, not the County. It is not an essential part of any decision below.

The only other issues raised by amici relate to aspects of the common interest doctrine. Amici wrongly assume that the common interest doctrine is necessary to explain why there was no waiver of work product protection when the County and Ecology exchanged emails. The common interest doctrine is a non-waiver rule to protect the confidentiality of privileged materials where disclosure might otherwise be required. But work product protection is lost only when the materials are disseminated to a litigation adversary, which never occurred here.

II. ARGUMENT

A. Summary of response.

The County does not rely upon the common interest doctrine in order to sustain the decision of the Court of Appeals. *See* Supplemental Brief of Respondent Kittitas County at 15-17. The Court need only address the common interest doctrine if it finds that work product protection of the emails was otherwise waived.

Amici misunderstand PRA cases dealing with litigation privileges and the controversy exemption. The County certainly agrees that the PRA is to be liberally construed and its exemptions narrowly construed to promote the public policy of open public records. RCW 42.56.030. However, the PRA does not require a narrower view of privilege law than that which would ordinarily govern a privilege issue in civil litigation.

Amici also err in suggesting that the common interest doctrine requires a formal common interest agreement. No particular level of formality is necessary for such an arrangement if the affiliated parties agree, either overtly or by the circumstances of their actions, to share confidential information concerning a litigated matter.

B. The concept of a “legal team” is not part of the law of attorney work product.

Amici’s brief leads with the argument that the County and Ecology were not on the same legal team. The phrase “legal team” is a shorthand way of describing the relationship between a lawyer and the lawyer’s assistants and hired investigators. The phrase was repeated throughout *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007), but otherwise is not a part of Washington caselaw on attorney work product. It is a label that was helpful to the Court in *Soter* but has

no particular significance to general work product analysis. The phrase is never used in Professor Orland's article. *See* Lewis H. Orland, *Observations on the Work Product Rule*, 29 Gonz. L. Rev. 281 (1994).

The work product rule's protection extends to materials prepared by or for a party or the representatives of a party. CR 26(b)(4). This can be broader than the phrase "legal team" would imply. If a lawyer is the primary agent directing the inquiry to which the third person is responding in creating tangible things in anticipation of litigation, then the protection should apply. The motivation behind the preparation of the document, rather than the identity of the person who prepares it, should control. *Caremark, Inc. v. Affiliated Computer Services, Inc.*, 195 F.R.D. 610, 615 (N.D. Ill. 2000). The County has shown that the exempt emails in this case were prepared under circumstances warranting work product protection. *See* Brief of Respondent Kittitas County at 39-47; Supplemental Brief of Respondent Kittitas County at 13-15.

C. The attorney work product doctrine is incorporated into the PRA's controversy exemption just as it exists in the ordinary civil discovery context.

This Court has repeatedly held that the PRA's controversy exemption is coextensive with the underlying law of the attorney-client privilege and the work product doctrine. This basic symmetry was initially described in *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d

869 (1998), confirmed in *O'Connor v. Dep't of Soc. & Health Serv.*, 143 Wn.2d 895, 25 P.3d 426 (2001), and restated in *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010).

In *Limstrom*, the Court weighed alternative views of the work product doctrine found in the civil rules of procedure and the criminal discovery rule. *Limstrom*, 136 Wn.2d at 605-606. The *Limstrom* Court was faced with the requirement to interpret the controversy exemption in a manner faithful to the PRA's mandate of broad disclosure. *Id.* The Court was aware that the concept of work product in the criminal discovery rule is "substantially more limited than the common law and civil rule definition." *Id.* at 609 (footnote omitted). The Court also found that the controversy exemption was "susceptible to more than one reasonable interpretation." *Id.* at 606. The circumstances of *Limstrom* required the Court to choose between the narrower privilege of CrR 4.7(f)(1) and the somewhat broader, but much more commonly used, privilege statement of CR 26(b)(4).¹

A plurality of the Court held that reliance on CR 26 provided "consistency in the application of the public records act" and that the purpose of broad dissemination of public records "should not change

¹ It was meaningful to the Court that CR 26(b)(4) was based on Fed. R. Civ. P. 26(b)(3) and its lineage could be traced directly back to the seminal case of *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). *Limstrom*, 136 Wn.2d at 608-611.

because of the forum in which the action is heard or the character of the proceeding to which the file relates." *Id.* This result was reached despite the dissenting view of four justices who would have held that the PRA's emphasis in favor of disclosure required application of the criminal discovery rule. *Id.* at 617 (Dolliver, J., dissenting).

By 2001, the Court no longer found the controversy exemption to require interpretation. The *O'Connor* Court observed that the controversy exemption, while "awkwardly worded" was not, however, "ambiguous." *O'Connor*, 143 Wn.2d at 906. In *O'Connor*, the controversy exemption meant that records relevant to a controversy followed the same exemption analysis as would apply "under superior court rules of pretrial discovery." *Id.* Finding the absence of any ambiguity, the *O'Connor* Court applied a "plain language interpretation" of the controversy exemption and affirmed the plurality decision in *Limstrom*. *Id.* Given *O'Connor's* confirmation of the rationale behind *Limstrom*, it comes as no surprise that *O'Connor* also observed that there was no conflict in integrating the standards of the civil rules of procedure with the Public Records Act. *Id.* at 910.

D. This Court has previously considered, but rejected, a dual construction of privilege law for PRA purposes and ordinary civil litigation purposes.

Amici's notion of a constrained approach to the work product doctrine does not follow from the PRA's overall liberal rule of construction. The current state of the law emphasizes consistency and predictability through identical interpretation of the work product doctrine in civil litigation and in the PRA. Amici fail to provide any discussion of the consequences for courts, litigants, public agencies, and PRA requesters if, instead of a parallel interpretation, the work product rule were to diverge from its ordinary jurisprudence when analyzed for the PRA controversy exemption.

1. The practical negative effects of a dual construction of privilege law would be considerable.

Washington allows the use of the PRA as a discovery device. *O'Connor*, 143 Wn.2d at 910. As with claims of privileges in discovery, existing PRA law requires full disclosure of agency claims of exemption. *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009). An agency's exemption log provides access to information for a requester to challenge the sufficiency of an agency's claim of privilege. The symmetry of handling privileges in litigation and exemptions under the PRA would be lost if the Court were to follow amici's interpretation.

One obvious consequence is that litigants will virtually always make PRA requests in order to avoid a narrower view of work product under the civil rules. Washington's trial courts have good familiarity with interpreting and applying the work product doctrine. But there is no body of law whatsoever to provide guidance on how to apply a PRA-based variant of the work product doctrine. "An uncertain privilege, or one that purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 392-393, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

Any difference between work product under CR 26(b)(4) and the PRA controversy exemption would be slight as an analytical matter. Yet courts would attempt to give meaning to any such distinction. The result is likely to be significant variability in actual practice. A marked increase in PRA-based litigation involving the controversy exemption will occur. Trial courts resolve discovery disputes quickly so as not to disrupt the timely conclusion of litigants' cases. But if the PRA provides greater access to records for a litigant who also makes a PRA request, then satellite PRA litigation will be common. In such cases, resolution of the underlying dispute may lag indefinitely while PRA litigation takes center stage. Or the underlying dispute may be resolved only to leave

vestigial PRA litigation afterwards. Indeed, the instant case -- and its companion case regarding the NOVA² -- may foreshadow a common type of litigation pattern in the future. A trial court's decision on a privilege issue may be seemingly resolved and a case concluded on the merits only to have PRA litigation continue for years afterward.

Under amici's interpretation, there would be a very real possibility that an agency could properly defend a privilege assertion in civil litigation only to have later jeopardy in a successive PRA action under a different standard of privilege analysis. This would substantially raise the risk of error for agencies attempting to comply with the PRA. This, in turn, would mean more confusion and delay in responding to requesters. An additional and unfamiliar overlay of privilege analysis will be difficult for courts and paralyzing for agencies who are also -- or who know they are likely to become -- litigants in both ordinary civil litigation and a PRA lawsuit.

2. The text of the PRA does not require a dual construction of privilege law.

For present purposes, the key is that *unambiguous* exemptions to the PRA do not require a special canon of interpretation. If a statute is unambiguous, the Court's review is at an end. *Jewels v. City of*

² See *ABC Holdings Inc. v. Kittitas County*, 187 Wn. App. 275, 348 P.3d 1222, review denied, 184 Wn.2d 1014 (2015).

Bellingham, 183 Wn.2d 388, 394, 353 P.3d 204 (2015). The controversy exemption is not ambiguous. *O'Connor*, 143 Wn.2d at 906. Where there is a direct link between a PRA exemption and other established sources of law (here, the work product doctrine and CR 26(b)(4)), it would be unnecessary and misguided to add a secondary layer to the exemption analysis.

Amici overlook the fact that privilege law is always required to be narrowly construed because privileges may conflict with the production of evidence. *State v. Burden*, 120 Wn.2d 371, 376, 841 P.2d 758 (1992). In close cases, courts require disclosure under the civil rules. A further narrowing may superficially tap into the PRA's purpose statement but has no additional analytical content. The Court should avoid burdening the PRA with unfamiliar new terms of privilege law. Privilege law already guards against unwarranted withholding of information.

This Court has rejected the basic reasoning underlying amici's argument. The most notable recent attempt to shape the law of the PRA's controversy exemption in the manner urged by amici failed on the same suggestion that the PRA's controversy exemption requires a gloss on otherwise-applicable privilege law.

In *Sanders*, the Court unanimously rejected the argument that the PRA requires an alternative approach to existing Washington law of privileges. *Sanders*, 169 Wn.2d at 853-854. The Court disagreed that the common interest doctrine's validity for privilege purposes was required to yield in the PRA exemption context to the presumption of disclosure. *Id.*

Justice Sanders raised a series of additional arguments seeking a narrow interpretation of the controversy exemption. *Id.* at 854-857. These included the claims that the controversy exemption would not apply: 1) where the controversy at issue is not facially apparent on the records claimed exempt; 2) where the controversy was not enumerated and specifically correlated with the exempt document; and 3) where the document in question allegedly predated the controversy by too long. *Id.* With respect to each of these arguments, the analysis of the Court reveals no special slant or bias against ordinary privilege law simply because the analysis occurred in a PRA setting. *Id.* To the contrary, the Court applied a traditional analysis of the work product doctrine for purposes of the controversy exemption. *Id.* The Court restated from *Soter* the rule that discoverability in the context of the civil rules serves as the touchstone for the PRA's controversy exemption. *Id.* at 854 (citing *Soter*, 162 Wn.2d at 731).

Here, amici dismissively state in a footnote that *Sanders* "does not provide much guidance in this case" Am. Br. at 4 n.1. To the contrary, a careful reading of *Sanders* and its predecessors provides considerable guidance. These cases show the extent to which this Court has considered and rejected the thrust of amici's claim.

Washington courts have avoided the adoption of dual but analytically separate interpretations of privilege law dependent upon whether the issue in controversy arises out of a PRA claim or other civil litigation. Instead, Washington courts have consistently and predictably merged the controversy exemption with the civil rules of procedure and Washington common law on privilege. Any contrary result would overturn *Sanders* and is not required under the PRA.

The consequences of this change in jurisprudence would place Washington in uncharted waters. This Court should reject this view. Amici would be more forthright by overtly stating that they are displeased with *Sanders* and seek its repudiation. This Court should not divorce the controversy exemption from the civil rules and the common law of privilege.

E. Amici's argument on the common interest doctrine incorrectly implies the necessity of a formal joint defense agreement.

Amici's simplistic argument that a narrow interpretation of PRA exemptions overcomes ordinary rules of work product should be rejected. Amici also argue that the same premise justifies a different departure from the law of the common interest doctrine. Amici argue that their perspective of a narrow interpretation of the controversy exemption requires greater scrutiny of whether parties asserting the common interest doctrine entered into a formal agreement to share confidential information and maintain confidentiality. Am. Br. at 5. As cited above, this Court has repeatedly applied ordinary privilege law for purposes of PRA controversy exemption analysis without a supplementary canon of narrow construction.

Amici are at least correct, however, that in the absence of such a canon of construction the common interest doctrine does not depend on a formal joint defense agreement. Although amici do not admit this proposition, their brief betrays an awareness that the result they seek can only be obtained under a particularly constrained reading of the caselaw on the common interest doctrine.

Amici cite two federal cases as support: *In re Pacific Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012), and *Avocent Redmond Corp. v. Rose Electronics, Inc.*, 516 F. Supp. 2d 1199 (W.D. Wash. 2007). Amici conclude from these cases that the common interest doctrine focuses on

the existence of a formal agreement entered into between the cooperating parties. This is incorrect. Both cited cases and the great weight of other sources show that the important factors are the nature of the parties' relations, their common purpose, and the type of information shared. Courts will construe the presence of a common interest based on a satisfactory showing of the surrounding circumstances that support invocation of the doctrine.

The root of the common interest doctrine in the Ninth Circuit is *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965).

In *Hunydee*, the court found the presence of a common interest protecting attorney-client privileged communications between two co-defendants. *Hunydee*, 355 F.2d at 185. This conclusion was reached in the absence of any finding of a particular form of agreement, whether written or oral, between the co-defendants regarding the exchanged information. *Id.* at 184.

More recently, in *Avocent Redmond Corp.*, the court rejected a claim of common interest. *Avocent Redmond Corp.*, 516 F. Supp. 2d at 1203-1204. In reaching this result, the court expressly disclaimed any requirement of a written agreement. *Id.* at 1203. More important to the inquiry is whether, in the absence of a written agreement, a common interest in a legal matter exists and is the grounds for the exchange of

information. The court focused on circumstantial evidence that the parties "intend[ed] and agree[d] to undertake a joint defense effort." *Id.* No common interest was present in *Avocent Redmond Corp.* because there was no common alignment with respect to the parties' litigation posture and purpose. *Id.* at 1204.

It was important to the court that the parties did not discuss any of their respective trial strategies. *Id.* at 1203. The parties did not discuss the handling of evidence for presentation at trial. *Id.* They shared no other confidential information because they were direct business competitors. *Id.* One of the parties emphasized a litigation strategy that it alone pursued and that, if successful, would have pitted it against its erstwhile common interest affiliate. *Id.* at 1203-1204. These party relational issues, rather than the level of formality of any agreement, were dispositive. *Id.* at 1204. The main point of analysis was the presence or absence of an alignment of interests and the coordination of joint defense effort or strategy. *Id.*

The inquiry in *Pacific Pictures* follows the same pattern. In that case, the Ninth Circuit observed that the common interest rule required that the communication at issue be in pursuit of a joint strategy "in accordance with some form of agreement – whether written or unwritten." *Pacific Pictures Corp.*, 679 F.3d at 1129. The court then

proceeded to search for indicia of an agreement to pursue common cause in litigation. *Id.* The inquiry was not focused on the presence of a formal agreement in the nature of a contract or other binding promise. Instead, emphasis was placed on whether the communication occurred pursuant to aligned actions, purposes, and strategy between the affiliated parties. *Id.* Because the allegedly protected statements did not stem from litigation strategy and "were not 'intended to facilitate representation'" the court found the absence of common interest. *Id.* at 1129-1130 (quoting *Hunydee*, 355 F.2d at 185).

These cases are consistent with the weight of authority. The general rule is that no written agreement formalizing a joint defense effort is necessary. The cases teach that the affiliated parties must agree to engage in a joint effort, which may be implied by actual cooperation toward a common legal goal. *See, e.g., U.S. v. Gonzales*, 669 F.3d 974, 979 (9th Cir. 2012) ("more importantly, it is clear that no written agreement is required and that a JDA [joint defense agreement] may be implied from conduct and situation"); *Continental Oil Co. v. U.S.*, 330 F.3d 347, 350 (9th Cir. 1964) (express understanding is not necessary); *O'Boyle v. Borough of Longport*, 218 N.J. 168, 198-199, 94 A.3d 299 (2014) (focusing analysis on existence of shared common purpose). Because of the focus on the interests and alignment of the

parties, a joint defense agreement will be valid even when it is not memorialized in written form until later. *Robert Bosch LLC v. Pylon Mfg. Corp.*, 263 F.R.D. 142, 150 (D. Del. 2009). The Court in *Sanders* did not require or identify a formal agreement to support the common interest in that case. *Sanders*, 169 Wn.2d at 853-854.

The key inquiry is whether the parties acted out of actual cooperation toward a common legal goal. “A uniformly applied common interest doctrine should not require a written confidentiality agreement.” Katharine T. Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. Pub. Int. L.J. 49, 82 (2005). “[A] confidentiality agreement has little additional legal value in establishing the privilege because courts will evaluate the existence of a common legal interest independently from the agreement.” *Id.*

Here, indicia of an agreement between the County and Ecology to unite in the actual formulation of litigation strategy in support of the NOVA can be found from several sources.

Representatives of both agencies coordinated their inspections of the Chem-Safe facility as the grounds for issuance of the NOVA emerged. CP 2008-2011. Mr. Rivard and Ms. Becker on behalf of the County worked closely with Ecology representatives in determining the

basis for issuance of the NOVA and gathering evidence regarding the same. CP 2008-2011; CP 888-892. The County and Ecology engaged in email communications to establish the County's litigation strategy. The emails disclosed attorney mental impressions, legal theories, legal research, and other litigation-oriented investigation matters. CP 365, 380. Ecology representatives testified in support of the NOVA in administrative proceedings before the hearing examiner. CP 1275-1276.

Emails exchanged between the County and Ecology maintained under seal, including notably in 2011 and early 2012, included formulation of legal arguments, draft declarations, and evaluations of response arguments raised by Chem-Safe. The emails and the circumstances surrounding their creation provide ample evidence of the parties' expectations. The emails bore a "confidential" legend, were created to coordinate legal strategies against Chem-Safe, and reflected the mental impressions of the County's attorney and the facts gathered by her. No more is required to uphold the common interest doctrine.

III. CONCLUSION

The Court of Appeals, like the trial court, correctly recognized that anticipated and actual litigation regarding the NOVA merited protection of the emails. The emails were created in furtherance of the litigation to uphold the NOVA. The emails were exchanged between

parties with aligned interests. The emails were never further divulged to anyone else. There was no waiver of work product protection.

This much is true without reliance on the common interest doctrine. The same factors additionally indicate the presence of a joint litigation effort between the County and Ecology sufficient to support a common interest agreement.

These conclusions would not have been controversial in any ordinary civil litigation setting. No different result is required here. The controversy exemption of the PRA is congruent with Washington law on privileges, including the traditional formulation of the work product doctrine.

The Court should affirm the decisions below.

Respectfully submitted this 1st day of March, 2017.

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Julie Kihn
JULIE KIHN

Signed and sworn to before me this 1ST day of March, 2017.

Kathy S. Lyczewski
Notary public in and for the State of
Washington, residing at SEAH.
My appointment expires: 4/27/18

