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**SUPREME COURT OF THE
STATE OF WASHINGTON**

FREDERICK and ANNALESA THOMAS, Plaintiffs-Appellants

v.

PIERCE COUNTY, Defendant-Respondent

PIERCE COUNTY'S ANSWERING BRIEF

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I. INTRODUCTION

In August of 2013 Appellants Frederick and Annalesa Thomas, plaintiffs below, demanded under the Public Records Act (hereinafter "PRA") that the Pierce County Prosecuting Attorney's Office (hereinafter "Prosecutor") produce "all files, records, and documents containing any information regarding" an officer-involved shooting incident – including "any investigative report or submission made to the Prosecuting Attorney from any of the police agencies or investigating agencies involved in this incident or its aftermath." It is undisputed: 1) these materials from the Prosecutor's litigation file were created and collected as part of its fact-gathering process in anticipation of potential criminal prosecution concerning the officer-involved shooting; and 2) the request was made while various police agencies were conducting an investigation for the purpose of a possible charging decision as to the officers involved and before the matter was submitted to the Prosecutor for it to make that decision.

When in response the Prosecutor properly asserted the well-established RCW 42.56.240 exemption for ongoing criminal investigations and CR 26(b) "work product" protection for these records from its litigation file it had gathered for fact finding, plaintiffs brought this PRA suit seeking sanctions and attorney's fees arguing the law should be changed. Though the complaint demanded production of the records,

plaintiffs had already obtained them from police before filing suit – indeed, many had been obtained by plaintiffs elsewhere even before the August 2013 public records request was made. After the suit was dismissed on the same settled statutory and work product grounds originally asserted by the Prosecutor, plaintiffs filed this appeal.

As shown below, in making their appellate argument, plaintiffs have overlooked and misstated: 1) the Prosecutor's arguments; 2) the record; and 3) the holdings of cited precedent. Thus, in order to overturn dismissal of their suit, plaintiffs ask this Court not only to disregard the actual position of the Prosecutor and the record, but to overturn almost 20 years of its precedent and that of the Court of Appeals.

II. COUNTER-STATEMENT OF THE ISSUES

1. When, during an ongoing criminal investigation, a PRA request demands the Prosecutor produce from its litigation file investigative materials it created or gathered so it can make a criminal charging decision, and when such documents are exempted by statute, civil rule, and unambiguous precedent, have plaintiffs shown a PRA violation and entitlement to have the Prosecutor's litigation records "produced" and "appropriate attorneys fees and penalties for the wrongful withholding" awarded?

2. Where plaintiffs asserted for the first time in their complaint that a follow-up letter to the Prosecutor about their previously de-

nied PRA request instead was a new request made after the Prosecutor's criminal charging decision – i.e., at a time when those materials had become available directly from police – and where plaintiffs made no attempt to demonstrate substantial need and inability to obtain the documents from a source other than the Prosecutor, have plaintiffs shown a PRA violation and entitlement to have Prosecutor's litigation records "produced" and "appropriate attorneys fees and penalties for the wrongful withholding" awarded them?

III. COUNTER-STATEMENT OF THE CASE

On May 24, 2013, a Special Weapons and Tactics sniper shot Leonard Thomas during a hostage stand-off with local police, none of whom were members of the Pierce County Sheriff's Department. *See* CP 17-35, 95-97, 101. Pursuant to longstanding Pierce County Medical Examiner protocol for police-involved fatal incidents, the Pierce County Prosecuting Attorney's Office immediately began gathering records as part of its fact finding because – as the complaint in this action explains – it "investigates such cases for ... purposes of a charging decision." CP 99, 108, 138-44. As part of its fact gathering under that established protocol, the Prosecutor's investigator created notes while present during the investigation by various police agencies, as well as gathered copies of investigative materials such as police reports and other tangible materials by direct requests to

the involved police agencies and other sources. CP 15-16, 183-84, 200.

To collect the aforementioned copies of tangible material as part of his investigation, the Prosecutor's investigator obtained for his office "electronic access to the law enforcement South Sound 911 data service 'WebRMS' site and collected from that electronic source various, relevant law enforcement reports made by the agencies involved in the shooting" – except for those of the City of Fife "which did not make use of this service." *Id.* As to Fife, the Prosecutor's investigator requested it directly provide its investigative file so the remaining relevant reports and investigative materials of the involved agencies could be obtained. *Id.* All the materials contained in the Prosecutor's file at that time therefore either were created by its Chief Investigator or his staff, collected and gathered by him directly from the aforementioned law enforcement website, or obtained directly from police at his specific request for purposes of his investigation for the Prosecutor so a charging decision could be made. *Id.* During this time, plaintiffs made various PRA requests – with some providing investigative materials (*i.e.* the Fife Municipal Court, Puyallup Police Department, South Sound 911) – and other police agencies declining under RCW 42.56.240(1) until the investigation was complete. *See* CP 152, 159-60.

On August 5, 2013, while this investigation was still ongoing and before it had been submitted for a charging decision, plaintiffs' counsel

made a PRA request to the Prosecutor for its "files, records, and documents containing any information regarding the shooting of Leonard Thomas" incident – including "any investigative report or submission made to the Prosecuting Attorney from any of the police agencies or investigating agencies involved in this incident or its aftermath." CP 104. On September 3, 2013, the Prosecutor's Office responded and explained that two separate and independent exemptions protected its requested litigation file materials; *i.e.*, 1) at the time of the request a criminal investigation was ongoing and no charging decision had been made so the materials were protected by the effective law enforcement exemption of RCW 42.56.240 (1); and 2) materials gathered by the Prosecutor in its fact finding for purposes of potential criminal litigation also were protected work product under CR 26 when sought from the Prosecutor. *See* CP 107-08. Nevertheless, plaintiffs continued to receive additional investigative materials from many of the remaining involved law enforcement agencies such as Milton, Puyallup and South Sound 911. *See* CP 152.

After the investigation was completed and a decision not to prosecute was made, Thomas' counsel on October 3, 2013, sent the Prosecutor a follow-up letter regarding the earlier September 2013 request – expressly identifying as its subject his earlier request by listing in its subject line the County-given designation for that previous request of "PA Reference No.

65/13-0934." *See* CP 111. This follow-up letter requested only that the Prosecutor "clarify and/or confirm that your statement of September 3, 2013 remains in effect and that the Prosecuting Attorney's Office will not release any documents pursuant to our August 6, 2013 request, notwithstanding the decision that no criminal charges will be filed against any of the officers involved in this matter." *See id.* (emphasis added). In response, the Prosecutor again "confirm[ed] that we consider your August 5, 2013 request to be complete" and that it would not change its decision to "not release any documents pursuant to your August 6 [sic], 2013 request" because, as "our September 3, 2013 letter" mentioned, the materials sought were exempt at the time that request was made. CP 113 (emphasis added).

Thomas's counsel did not dispute the County's position, never attempted to clarify the Prosecutor's interpretation of his October 2013 request for "clarification," did not claim he had made a new request, and never alleged – much less demonstrated – a substantial need and inability to obtain substantially equivalent materials from another source. Instead, though plaintiffs had obtained much of these materials from police before both their PRA request to the Prosecutor as well as before the making of the charging decision, and the rest from police thereafter, *see e.g.* CP 152, on November 1, 2013, plaintiffs filed suit seeking penalties and attorneys

fees under the PRA.¹

Specifically, their suit disputed that the Prosecutor was entitled to assert protection for "all the police reports and evidence submitted to the Prosecuting Attorney regarding the shooting incident" on the ground they were exempt as part of its fact finding during its ongoing criminal investigation. *See* CP 95-96, 98-99, 101. For the first time, the Thomas's complaint then claimed they needed the Prosecutor's files before the charging decision had been made in order to: 1) "inform themselves as best they could, before the conclusion" of the charging decision; 2) conduct "their own fully informed, timely investigation;" and 3) "provide the Prosecutor additional information the responding police agencies were either unable or unwilling to discover." CP 100. On January 14, 2014, Pierce County moved for summary judgment on the same two exemptions of CR 26 and RCW 42.56.240(1) that it had listed in its PRA response. *See* CP 1-14. In response, plaintiffs offered no evidence in support their newly articulated claims of "need," much less evidence of an inability to obtain the equivalent from other sources such as the police – especially since by then the charging decision had been made and police were free to respond to such

¹ Appellants' brief claims they "have yet to receive" some "audio recordings of the officer interviews following the shooting and video taken of the shooting scene." *See* AB 40. However, the only supporting citation given for that claim is to the unsworn and unsupported oral argument of plaintiffs' counsel on summary judgment. *Id.* As a matter of law, "[a]rgument of counsel does not constitute evidence" on a motion for summary judgment. *See e.g. Green v. A.P.C.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998).

PRA requests and all had done so. *See* CP 152.

On April 23, 2014, the King County Superior Court dismissed plaintiffs' claim. *See* CP 224-25. Though an appellate court "reviews summary judgment *de novo*," *see Wash. Fed. Sav. & Loan Ass'n v. McNaughton Grp.*, 179 Wn.App. 319, 319 P.3d 805, 808 (2014), and therefore "may affirm on any basis supported by the record," *see Steinbock v. Ferry Cnty. Public Util. Dist. No. 1*, 165 Wn.App. 479, 485, 269 P. 3d 275 (2011) (emphasis added), the basis for the Superior Court's decision addressed both exemptions asserted by the County.

First, the trial court apparently agreed the "effective law enforcement exemption" of RCW 42.56.240(1) was a sufficient ground for denying the August 5, 2013, PRA request because the charging decision had not yet been made. *See* CP 216; *see also Newman v. King Cnty.*, 133 Wn. 2d 565, 947 P.2d 712 (1997). Regarding what it described as Thomas's "unclear, inartful, and lent ... to confusion" follow-up clarification letter of October 3, 2013, the trial court noted "even if that request was considered a 'new' PRA request" at a time when RCW 42.56.240(1) no longer applied because the charging decision had been made by then, *see e.g. Sargent v. Seattle Police Dep't.*, 179 Wn.2d 376, 314 P.3d 1093 (2013), such a concession to plaintiffs would be "rendered moot by the fact that the records remained protected by the work product rule." CP 213, 216-17.

As to the work product exemption, the Superior Court acknowledged that *Limstrom v. Ladenburg*, 136 Wn.2d 595, 614-15, 963 P.2d 869 (1998) – a plurality decision that expressly protected police reports "gathered by the prosecutor" – "clearly rejected" the "mental impression"-only work product test that plaintiffs argued should be resurrected. CP 217. *Limstrom* specifically addressed the same argument that proof of mental impressions should be required for all categories of work product, but instead held "a bright-line rule ... applied to discovery requests for attorney work product" so that "mental impressions of the attorney and other representatives of a party are absolutely protected" while:

[T]angible items gathered by the attorney and other representatives of a party are subject to disclosure only upon a showing that the party seeking disclosure of the documents actually has substantial need of the materials and that the party is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.

CP 218-19 (quoting *Limstrom*, 136 Wn.2d at 611-12) (emphasis added). The Superior Court found not only that *Limstrom* left no "room for interpretation" but that it "was cited with approval in an identical situation" in *Koenig v. Pierce County*, 151 Wn.App. 221, 231, 211 P.3d 423 (2009), *rev. denied* 168 Wn.2d 1023 (2010). *See* CP 219.

Applying these well-settled principles to the record, the trial court found, *inter alia*, that plaintiffs "never told the PCPAO at the time they

requested the documents that they had a substantial need for the documents and could not procure them elsewhere" as required and "[e]ven in its current motion, ... fail to state a reason why they had a substantial need for the documents," "fail to state any real prejudice from non-disclosure of the records, and ... also fail to explain why they could not have retrieved the documents directly from the law enforcement agencies" after the charging decision was made and before their October 2013 follow-up letter when RCW 42.56.240(1) no longer applied. *Id.*

Plaintiffs appeal and seek direct review from the Supreme Court.

IV. ARGUMENT

Plaintiffs begin their argument by quoting this Court's statement in *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007), that the PRA "should be liberally construed and its exemptions should be narrowly construed in favor of disclosure." AB 15. Plaintiffs ignore this Court's next sentence in *Soter* is: "But where a listed exemption squarely applies, disclosure is not appropriate." 162 Wn.2d at 731 (emphasis added). As was the case in *Soter's* dismissal of that PRA action, so too here, as a matter of law exemptions "squarely" apply and dictate that "disclosure is not appropriate."

Indeed, plaintiffs do not dispute on appeal that the effective law enforcement exemption of RCW 42.56.240(1) alone barred any claim based on their August 2013 PRA request made prior to the Prosecutor's charging

decision. AB 4-5, 16-40. Rather, plaintiffs' appeal is based on their October 2013 follow-up letter that only sought "clarification" of the Prosecutor's earlier response and asserts only the separate ground for dismissal of "work product." *Id.* Inexplicably focusing their appeal exclusively only on this one of the two grounds for dismissal, plaintiffs' repeatedly and mistakenly assert work product protection somehow is "narrow" under the PRA. *See e.g.* AB 15, 24, 37. Instead, this Court repeatedly has made clear the "work product" rule is not applied differently in PRA actions because "[a]ny materials that would not be discoverable in the context of a controversy under the civil rules of pretrial discovery are also exempt from public disclosure under RCW 42.56.290." *Soter*, 162 Wn.2d at 740-44 (citing *Guillen v. Pierce County*, 144 Wn. 2d 696, 713 (2001), *rev'd on other grounds*, 537 U.S. 129 (2003)) (emphasis added); *see also e.g. Limstrom*, 136 Wn.2d at 605-09 ("rule governing discovery in civil cases, should apply to a public records act request for information from an agency's litigation files."); *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993) (when documents are "protected under the work product rule, the exemption in RCW 42.17.310 (1)(j) will apply."); *Koenig*, 151 Wn.App. at 229 ("'[W]ork product' exemption relies on the rules of pretrial discovery to define the parameters of the work product rule for purposes of applying the exemption.") (emphasis added).

In any case, plaintiffs argue they are entitled to have the Prosecutor's

litigation files "produced, [and] appropriate attorneys fees and penalties for the wrongful withholding" awarded to them because supposedly: 1) *Limstrom* and its work product progeny are not precedential; 2) *Limstrom* and its progeny for almost 20 years thereafter should be overruled; and 3) plaintiffs had a substantial need and inability to obtain the records despite the absence from the record of any cited factual basis for the former and their conflation of facts as to the latter. AB 16-40. As shown below, this appeal of one of two equally valid grounds for dismissal is meritless.

A. MISSTATEMENTS OF COUNTY'S POSITION DO NOT SHOW TRIAL COURT ERRED

Plaintiffs begin their legal analysis with a subheading that falsely asserts, contrary to the record and without citing any factual basis, that the Prosecutor's theory is "That All Documents Gathered into a Prosecutor's File Are Work Product." AB 17. The record instead shows the Prosecutor consistently relied on both RCW 42.56.240(1) and the well-settled principle that "materials in a prosecutor's possession as part of its fact gathering is protected work product as a matter of law." *See e.g.* CP 8 (emphasis added). *See also* CP 173-74. As demonstrated below, the latter principle is well established in unambiguous holdings of this Court and the Court of Appeals that apply CR 26(b)(4) to protect prosecutorial litigation files containing police reports and documentary evidence collected as part of

prosecutorial fact gathering. See e.g. *Limstrom*, 136 Wn.2d at 615 (1998) (police reports in prosecutor's files "are part of the prosecutor's fact-gathering process and are work product") (emphasis added); *Koenig*, 151 Wn.App. at 230 (2009) (police reports and witness's statement taken by a detective in anticipation of possible prosecution of police officer "would not be subject to disclosure under the civil rule because it is a factual document gathered by the prosecutor in anticipation of litigation").

B. MISSTATEMENTS OF FACT REGARDING PLAINTIFFS' OCTOBER 2013 LETTER DO NOT SHOW THE TRIAL COURT ERRED

Plaintiffs' appeal also wrongfully mischaracterizes their October 2013 request for the Prosecutor to "clarify" its earlier August 2013 PRA response as instead being a "renewed" PRA request made after the criminal investigation was completed. AB 12, 39. In fact, the record shows plaintiffs' only PRA request was made in August 2013 when it is undisputed the criminal investigation was still ongoing and was thus independently barred also by the protections of RCW 42.56.240(1).

1. RCW 42.56.240(1) Barred Plaintiffs' August 2013 PRA Request

Plaintiffs admit they made a PRA request on "August 5, 2013," at a time when the police involved shooting was still being investigated, and that the criminal case was not referred to the Prosecutor for a charging de-

cision until thereafter on "August 28, 2013." AB 9; CP 96, 98-99, 189. Presumably due to the RCW 42.56.240(1) exemption, plaintiffs make no argument for relief based on their August 2013 request. AB 4-5, 14-40.²

That statute expressly protects from disclosure: "Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, ... the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy." RCW 42.56.240(1). This Court holds under that statute "records are 'essential to effective law enforcement' if 'the investigation is leading toward an enforcement proceeding," and thus "'disclosure is not required' where a County's criminal investigation was open, law enforcement personnel were assigned to the case, and enforcement proceedings were still contemplated." *Newman v. King Cnty.*, 133 Wn.2d 565, 572-73, 947 P.2d 712 (1997). Absent this statutory protection, this Court has stated premature production of such investigative files:

... could result in the disclosure of sensitive information. The determination of sensitive or nonsensitive documents often cannot be made until the case has been solved. This exemption allows the law enforcement agency, not the courts, to determine what information, if any, is essential to solve a case. The language used in the statute protects law

² Indeed, plaintiffs' brief mentions the effective law enforcement privilege of RCW 42.56.240(1) only once in passing to assert – without explanation or dispute – that it authorized withholding of investigative materials at the time of their August 2013 PRA request. *See* AB 38-39.

enforcement agencies from disclosure of the contents of their investigatory files.

Newman, 133 Wn.2d at 572-73. Indeed, this Court recently reiterated it "established the categorical application of the effective law enforcement exemption in *Newman*," and reasserted that the application of this "categorical exemption" for criminal investigations before they are completed "better serve[s]" the public "by keeping the requested information confidential so that the police could finish their investigation and catch the perpetrator." *Sargent*, 179 Wn.2d at 387, 393.

Though this Court has declined to "[e]xpand[]" this "rule to cases that have been referred for charges but rejected by the prosecutor" before a PRA request was made and therefore "ceases to apply categorically to investigative records once the case is first referred to a prosecutor for a charging decision," *id.* at 389, 402 (emphasis added), it has confirmed the "exemption" unequivocally continues to apply to the "class of information, the nondisclosure of which we are confident is always essential to effective law enforcement: situations where police have not yet referred the matter to a prosecutor for a charging decision and revelation to the defendant." *See id.* at 389. Thus, while "enforcement proceedings were still contemplated, the agency should not be required to parse the relevance of individual documents" because at that stage "the law enforcement agency,

rather than the court, was the proper party to determine whether nondisclosure was essential" since while an investigation is ongoing it cannot be determined what is essential to law enforcement and what is not. *Id.* at 387 (citing *Newman, supra.*, at 574-75).

Precedent is clear the above statutory PRA exemption applies to protect investigations conducted by prosecutors. *See Cowles Pub. Co. v. Pierce Cnty. Prosecutor's Office*, 111 Wn.App. 502, 508, 45 P.3d 620 (2002) (prosecutor's investigation "qualifies as an investigative record" and is protected under the PRA). Further, as noted above, the complaint and undisputed evidence establish that at the time of the August 5, 2013, PRA request, the criminal investigation was open, personnel were assigned to it, enforcement proceedings were contemplated, and it had yet to be referred to the Prosecutor for charging. *See* CP 15-16, 95-96, 98-99, 104-09.

2. **Plaintiffs' October 2013 Letter Sought "Clarification" and Not a New PRA Request**

To avoid the above dispositive effect of RCW 42.56.240(1) on their appeal, plaintiffs first allege that "[a]fter the September 4, 2013 announcement of the Pierce County Prosecuting Attorney ... the requested documents should have been disclosed and produced, because, even by the Prosecutor's own account, there is no more open and active investigation." AB 10, CP 100-01. However, the validity of an exemption is determined

at the time the request is made. See Wash. State Bar Ass'n, *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws* § 5.3, at 5–31 (2006) (PRA "does not provide for 'continuing' or 'standing' requests."). See also *Gendler v. Batiste*, 158 Wn.App. 661, 673, 242 P.3d 947 (2010) ("agency has no duty under the PRA, however, to ... produce a record that does not exist at the time the request is made") (citing *Sperr v. City of Spokane*, 123 Wn.App. 132, 136-37, 96 P.3d 1012 (2004) and *Smith v. Okanogan County*, 100 Wn.App. 7, 13–14, 994 P.2d 857 (2000)); *BLAW v. McCarthy*, 152 Wn.App. 720, 740, 218 P.3d 196 (2009) (PRA precludes destruction of a public record only "[i]f a public record request is made at a time when such record exists") (quoting RCW 42.56.100). Thus the Prosecutor's response to the August 2013 request did not become retroactively invalid when circumstances justifying one of the grounds for denial later changed.

Because at the time of their August 2013 request the investigatory materials were statutorily protected since the matter had not yet been "referred ... to a prosecutor for a charging decision," see *Sargent, supra*, plaintiffs next mischaracterize their October 2013 letter as having "renewed" their statutorily barred request. See AB 12, 39. However, the October 2013 letter nowhere gave notice of such or at any point claimed the August 2013 request was being "renewed." See CP 111. Instead the record

shows their October letter on its face expressly identified its subject as their earlier "PA Reference No. 65/13-0934" request, and exclusively demanded only that the Prosecutor "clarify and/or confirm that your statement of September 3, 2013 remains in effect and that the Prosecuting Attorney's Office will not release any documents pursuant to our August 6, 2013 request." CP 111. (emphasis added).

Hence, the County replied to their demand by a letter which also reflected that its subject was the "Public Records Request Dated August 5, 2013 ... PA Reference No. 65/13-0934]," and restated its earlier denial "remains in effect and that the Prosecutor's Office will not release any documents pursuant to your August 6 [sic], 2013 request" and thus confirmed it considered "your August 5, 2013 request to be complete." CP 113 (emphasis added). Plaintiffs never advised the County their October letter seeking "clarification" somehow was really a "renewed" request.

Further, as the trial court recognized and as is shown below, had plaintiffs actually made a second PRA request in October 2013, their suit still would have been separately barred by the work product protection.

C. PROSECUTOR DID NOT VIOLATE PRA AND TRIAL COURT DID NOT ERR BY RELYING ON *LIMSTROM V. LADENBURG* AND ITS PROGENY

Having addressed plaintiffs' mischaracterization of the record, a proper analysis of plaintiffs' argument next requires discussion of their

attempts to obscure and change Washington's long-settled work product precedent. Specifically, to argue the Prosecutor's gathering of reports and evidence from police is not separately protected as "ordinary work product," plaintiffs argue *Limstrom v. Ladenburg* is not precedent, is distinguishable, or should be overruled by "clarification." See AB 16-40. None of these arguments withstand examination.

1. ***Limstrom and Its Progeny Are Controlling Law in Washington***

Plaintiffs begin by arguing *Limstrom* "is dictum, a creature of the plurality decision, and thus not binding." AB 20-21. This argument overlooks almost 20 years of Washington precedent.

First, plaintiffs ignore that in the absence of binding contrary precedent a plurality decision is "highly persuasive." See *Koenig*, 151 Wn.App. at 231 (citing *Texas v. Brown*, 460 U.S. 730, 737 (1983) ("[T]he considered opinion of four Members of this Court ... should obviously be the point of reference for further discussion of the issue")). Indeed, plaintiffs cite no Washington precedent contrary to *Limstrom*.

Second, in the almost two decades since *Limstrom*, this Court and the Court of Appeals have repeatedly cited and followed that decision. See e.g. *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 327 P.3d 600, 605 (2013) (citing *Limstrom* to show the "PRA's exemptions ...

outweigh the PRA's broad policy in favor of disclosing public records"); *Ameriquist Mortg. Co. v. Office of Attorney Gen. of Wash.*, 177 Wn.2d 467, 486, 300 P.3d 799 (2013) (same); *Wash. State Dep't. of Transp. v. Mendoza de Sugiyama*, 182 Wn.App. 588, 330 P.3d 209, 213 (2014) (citing *Limstrom* to show "[o]ur Supreme Court has held that the [PRA's] controversy exemption applies to the work product doctrine"); *Kleven v. King Cnty. Prosecutor*, 112 Wn.App. 18, 24, 53 P.3d 516 (2002) (citing *Limstrom* to show "the pretrial discovery rules referred to in RCW 42.17.310(1)(j) are those set forth in the civil rules for superior court, CR 26" and thus "includes within the definition of work product factual information which is collected or gathered by an attorney, as well as the attorney's legal research, theories, opinions and conclusions.") (emphasis added). Indeed, this Court has expressly relied upon the "analysis that the *Limstrom* court adopted," described it as an interpretation by "this court" reflecting what "we have held," and specifically "decline[d] to overrule *Limstrom* ..." *Soter*, 162 Wn.2d at 733. *See also Kailin v. Clallam County*, 152 Wn.App. 974, 986, 220 P.3d 222 (2009) ("precedential value of a plurality decision" in *Limstrom* has been recognized because it was "cited with approval in a subsequent supreme court decision" of *Soter*).

Third, plaintiffs somehow overlook that the assertion *Limstrom* supposedly is "*dicta*" and "Non-Precedential" was expressly rejected years

ago by both this Court and the Court of Appeals. In *Soter's* discussion of the PRA, this Court not only refers over 20 times to *Limstrom*, but does so because – though "*Limstrom* was a plurality opinion" – the "dissent did not take issue with the plurality's analysis of CR 26(b)(4), arguing instead that the criminal, rather than the civil, rule should be applied and that the prosecutor in that case failed to adequately provide an index of the records at issue." *Id.* at 741 n. 10. In *Koenig* the Court of Appeals also expressly rejected arguments identical to that of plaintiffs here – *i.e.*, "that plurality opinions like *Limstrom* are not binding" – and instead affirmed dismissal of a PRA suit that similarly sought police reports and other evidence from the prosecutor's files. 151 Wn.App. at 230-31. Indeed, it explained there was "no opinion other than the *Limstrom* lead opinion that the prosecutor might have chosen to follow" so there could be no "Public Records Act violation by deciding to follow the civil discovery rule in reliance on the plurality opinion in *Limstrom*." *Id.*

2. ***Limstrom* and Its Progeny Are Indistinguishable on Their Facts**

Plaintiffs next claim the Supreme Court's protection of police investigative materials in *Limstrom* can be distinguished. Specifically, they argue that in *Limstrom* police reports were "prepared by a Pierce County Deputy, *i.e.*, by a representative of the deputy prosecutor," while here the

reports merely were obtained by the Prosecutor's investigator from other police departments. AB 21-22 (emphasis in original). Again, plaintiffs misstate not just the authority upon which they rely, but also the almost twenty years of our state courts' subsequent precedent.

First, *Limstrom* nowhere describes the author of the police reports in that case as the Prosecutor's "representative." *See* 136 Wn.2d 595-617. Indeed, as even plaintiffs inconsistently acknowledge, *see* AB 21, this Court expressly rejects the claim that "an investigator from a law enforcement agency is merely an arm of the prosecutor's office for purposes of a work product analysis." *See Seattle Times Co. v. Serko*, 170 Wn.2d 581, 243 P.3d 919 (2010). More importantly, *Limstrom* nowhere holds the test for "work product" somehow turns on who authored a police report which is later gathered by the Prosecutor or its agents for litigation purposes. *Id.* Instead, it expressly adopts a "bright line rule" that "factual written statements and other tangible items gathered by the attorney and other representatives of a party are subject to disclosure only upon a showing that the party seeking disclosure of the documents actually has substantial need of the materials and that the party is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means." *Id.* at 611-12 (emphasis added). Here, the undisputed record confirms the factual documents in the Prosecutor's litigation file at the time of plaintiffs' PRA

request were gathered for purposes of litigation by the Prosecutor's "Chief Investigator" and therefore protected from compelled disclosure from the Prosecutor's hands absent the required showing by plaintiffs. CP 15-16, 183-84. This case instead is indistinguishable from *Limstrom*.

Second, plaintiffs assert the Prosecutor's agent "did nothing more than move ... records in bulk from the RMS intranet site to its own files" and that *Hickman v. Taylor*, 329 U.S. 495, 511(1947), somehow supposedly requires "that one 'sift[s] what he considers to be the relevant from the irrelevant facts." AB 23. The record instead is undisputed the Prosecutor's Chief Investigator was present during witness interviews, created his own records, as well as obtained the police agencies' later records upon their completion from both the intranet site and by direct request to those agencies. CP 15-16, 183-84, 200. More importantly, even the United States Supreme Court when interpreting different federal law in *Hickman* nowhere stated that records collected by attorneys must be "sifted" before they are protected from being seized from attorney's files. Rather, *Hickman* states the opposite; the more complete quote from the passage cited by plaintiffs – and quoted at even more length in *Limstrom*, 136 Wn.2d at 876 – explains:

It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case

demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy *without undue and needless interference.*

329 U.S. 510-11 (emphasis added). Hence, in explaining the need for the work product privilege, *Hickman* on its face recognized an attorney's "[p]roper preparation ... demands that he assemble information," as well as "sift ..., prepare his legal theories and plan his strategy" – all "without undue and needless interference." Far from limiting the work product rule only to attorney "mental impressions," *Hickman* recognized that "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." 329 U.S. 510 (emphasis added). Plaintiffs' misuse of *Hickman*, whose work product analysis in any case now "has been supplanted by Rule 26(b)(3) of the Federal Rules of Civil Procedure," *Seal v. Univ. of Pittsburgh*, 135 F.R.D. 113 (W.D.Pa. 1990), reflects their refusal to acknowledge Washington precedent's well-settled principle that there are at least two types of protected "work product."

Plaintiffs' appeal acknowledges only one type of work product: "mental impressions." In Washington such is but one of two types of protected work product; i.e., "opinion work product" which is "almost always exempt from discovery, regardless of the level of need." *See Soter*, 162

Wn.2d at 739, 741, 744-45 (notes created by attorneys and their investigators were all "absolutely protected") (emphasis added). *See also Limstrom*, 136 Wn.2d at 611-12 ("notes or memoranda prepared by the attorney from oral communications should be absolutely protected, unless the attorney's mental impressions are directly at issue"). The type of protected work product at issue here instead is a separate recognized kind; *i.e.*, what this Supreme Court identifies as "ordinary, rather than opinion, work product" where "[a]n attorney's gathering of factual items and documents is protected from disclosure, under the work product rule set forth in CR 26(b)(4)," and overcome only on plaintiffs demonstrating "substantial need and an inability, without undue hardship, to obtain the documents or items from another source." *See Soter*, 162 Wn.2d at 748 (emphasis added); *Limstrom*, 136 Wn.2d at 611 (emphasis added).

Accordingly, this Court in *Limstrom* "[w]ith respect to the factual documents gathered by the prosecutor" holds "the documents are part of the prosecutor's fact-gathering process and are work product" and thus "protected from disclosure." *Id.* (emphasis added). *See also id.* at 615 (police reports were "part of the prosecutor's fact-gathering process and are work product"). Likewise, in *Soter*, 162 Wn.2d at 748, this same Court relied on *Limstrom* to hold photographs and a map collected into a government attorney's file were protected because they "are ordinary work prod-

uct." Likewise, the Court of Appeals in *Koenig*, 151 Wn.App. at 230, held a witness statement taken by law enforcement, police reports, and other documents were protected work product because they are factual material "gathered by the prosecutor in anticipation of litigation."³ Washington law imposes no requirement that an attorney's "mental process" be further proved before "ordinary work product" protection exists. *See also* Final Leg. Rep., Substitute H.B. 1897, 60th Leg., Reg. Sess., at 175 (Wash. 2007)("courts have defined work product to include factual information which is collected or gathered by an attorney, as well as the attorney's legal research, theories, opinions, and conclusions.")(emphasis added).

Third, plaintiffs' attempt to distinguish this case because here only investigative materials from other agencies were gathered, is directly refuted by *Koenig's* express holding that "documents forwarded by various law enforcement agencies" to the prosecutor as part of its fact gathering are protected work product when sought from the prosecutor's litigation file. *See Koenig*, 151 Wn.App. at 224. Plaintiffs nonsensically and base-

³ Plaintiffs assert that documents sought out and obtained by the Prosecutor's Chief Investigator were not gathered or collected "in any meaningful way." AB 23. *But see* CP 15-16, 183-84, 200. In fact, the first plain and ordinary meaning of "gather" means "to cause to come together." American Heritage Dictionary 362, 726 (5th ed. 2011) (emphasis added). For this reason, courts interpreting public records acts hold documents are "gathered" where they also are "amassed or collected in one place" and therefore protect documents that are "sent" to an agency. *See e.g. Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp.*, 616 S.E. 2d 602, 607 (N.C. App. 2005). Thus, documents also expressly characterized as having merely been "submitted" are deemed to have been "gathered" and protected. *See Elkin Tribune Inc. v. Yadkin Cnty. Bd. of Comm'rs*, 417 S.E.2d 465, 737-38 (N.C. 1992).

lessly attempt to distinguish *Koenig* on this issue by disingenuously claiming the police reports there supposedly were "largely prepared not by independent agencies, as here, but by the Pierce County Sheriff's Office." *See* AB 25 (emphasis added). This ignores that, even if such were true, *Koenig* still held police reports "forwarded by various agencies" were protected work product when sought from the Prosecutor's gathered materials. More troublesome, plaintiffs' factual assertion is a bald invention since *Koenig* says nothing about who "largely prepared" the police reports in that case.

Finally, plaintiffs are relegated to arguing that *Koenig* was "silent about what selection process if any underlay the protection." AB 25. Courts, of course, are "silent" on matters that are irrelevant to their decisions. No Washington case has ever stated a "selection process" was a factor for protecting materials gathered by counsel because: 1) an inquiry into the "selection process" would require intrusion into the protected mental impressions of the attorney or agent; and 2) this Court in *Limstrom*, expressly instead recognizes "a bright-line rule ... applied to discovery requests for attorney work product" that dictates "tangible items gathered by the attorney and other representatives of a party are subject to disclosure only upon a showing that the party seeking disclosure of the documents actually has substantial need of the materials and that the party is unable, without undue hardship, to obtain the substantial equivalent of the materi-

als by other means." *Limstrom*, 136 Wn.2d at 611-612 (emphasis added).

3. **Long-Standing Washington Precedent Should Not Be Overruled by Means of a Supposed "Clarification" of *Limstrom***

Plaintiffs incredibly claim that "this Court did not have occasion to consider the question of whether, or when, police reports, taped interviews, and other documents routinely prepared by third-party police agencies should acquire work product status." AB 26. In fact, *Limstrom* expressly addresses documents gathered from third party police agencies such as "narrative police reports," 136 Wn.2d at 614, and held that a "bright line rule ... for attorney work product" was "consistent with our decisions" and "we apply it in this case." *Id.* at 611 (emphasis added). This rule has not only been followed ever since by this Court and the Court of Appeals to protect police reports and witness interviews, *see e.g. Soter*, 163 Wn.2d at 744 ("witness interviews"); *Koenig*, 151 Wn.App. at 226, 236 ("police reports; transcripts of interviews" and "other documents" in prosecutors' files that were "forwarded" to it), but this Court thereafter expressly "decline[d] to abandon the *Limstrom* analysis" when later invited to do so. *See Soter*, 162 Wn.2d at 743. Though plaintiffs somehow assert "the Limstrom plurality did not establish a broad rule," *see* AB 26, plaintiffs cannot avoid directly contrary language in precedent simply by misstating it. *See* 136 Wn.2d at 611-612.

a. **Precedent Protects Those Records in Prosecutor's Possession That Were Created in "Ordinary Course of Business" but Gathered By It in Anticipation of Litigation**

Despite the above precedent unambiguously rejecting their argument, plaintiffs misleadingly assert "Washington law already holds that 'the work product doctrine does not shield records created during the ordinary course of business.'" AB 27; *see also* AB 33-34. The state authority they cite as support, however, either did not concern work product principles at all or addressed only the issue of whether records were "opinion work product" (i.e., created by or for counsel) rather than addressing Washington's test for "ordinary work product" (i.e., gathered by or on behalf of that counsel in anticipation or litigation). AB 27-29, 33-34.⁴ Plaintiffs cannot overturn the established principle of "ordinary work product" by misapplying inapplicable case law.

⁴ Citing *Morgan v. Federal Way*, 166 Wn.2d 747, 754, 213 P.3d 596 (2009) (records created by attorney were not made "in reasonable anticipation of litigation"); *In re Det. of Williams*, 147 Wn.2d 476, 494, 55 P.3d 597 (2002) (records at issue were not prepared in anticipation of litigation by attorney's agents and no discussion of whether they were part of an attorney's fact gathering for litigation); *Overlake Fund v. City of Bellevue*, 60 Wn.App. 787, 789-90 (1991) (not addressing if documents gathered as part of attorney's fact gathering but whether was factual dispute if documents were created in anticipation of litigation); *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 398-99, 706 P.2d 212 (1985) (no discussion if documents were part of an attorney's fact gathering for litigation); *State v. Bellerouche*, 129 Wn.App. 912, 120 P.3d 971 (2005) (work product not discussed); *State v. Ecklund*, 30 Wn.App. 313, 319 n.4, 633 P.2d 933 (1981) (same); *State v. Heggins*, 55 Wn.App. 591, 779 P.2d 285 (1989) (same); *State v. Iverson*, 126 Wn. App. 329, 339-40, 108 P.3d 799, 803 (2005); *State v. Plewak*, 46 Wn.App. 757, 732 P.2d 999 (1987) (same).

When our state's courts instead address the actual issue here of whether work product protection applies to documents collected for purposes of litigation by counsel, precedent is clear: such is "ordinary work product" because it includes documents created by a non-party in the normal course of business even though not originally created for litigation. See e.g. *Limstrom*, 136 Wn. 2d at 615 (police reports were "part of the prosecutor's fact-gathering process and are work product") (emphasis added); *Koenig*, 151 Wn.App. at 230 (witness's statement taken by law enforcement, police reports, and "various documents" are protected work product because they are factual documents "gathered by the prosecutor in anticipation of litigation").

b. Plaintiff's Cited Federal Case Law Is Inapplicable

Plaintiffs next argue Washington's "ordinary work product" rule "[i]s [n]ot [c]onsistent" with federal court case law interpreting the federal work product rule and Freedom of Information Act (hereinafter "FOIA"). AB 29-32, 34-36. More importantly, federal case law is not consistent with Washington precedent interpreting our state's own CR 26 and PRA.

i) Federal "Selection" Test Is Contrary to Washington Precedent

Plaintiffs first argue again that their cited federal case law holds "work product should involve some actual selection or compilation pro-

cess, rather than" a supposed "rote 'gathering' that the Prosecutor's Office engaged in here." *See* AB 31, 36-37. Apart from providing no evidence the Prosecutor's investigator did not "sift through" the reports here and conclude all were pertinent to his fact gathering so that their retention thereafter did reflect his mental process, the argument also fails as a matter of our contrary state law. Indeed, plaintiffs' cited federal cases not only are contrary to Washington precedent discussed above, but contrary to each other.

Some of plaintiffs' cited federal cases hold a selection process actually brings collected documents within the far more "highly-protected category of opinion work product" rather than "ordinary" work product protection. *See Sporck v. Peil*, 759 F.2d 312, 315-17 (3rd Cir. 1985) (emphasis added). *See also Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 625, 661 (D. Nev. 2013). Other federal citations by plaintiffs extend protection to collected documents only if there is proof of a "selection" process. *See In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002*, 318 F.3d 379, 386-87 (2nd Cir. 2003). Still others appear to reject protection for any collected document regardless of how chosen. *See Willingham v. Ashcroft*, 228 F.R.D. 1, 6-7 (D.D.C. 2005). Further, some federal courts not cited by plaintiffs take yet a fourth course and recognize that "[c]ritically, these cases turned primarily on the issue of whether the documents requested were already in possession of the party requesting disclosure" as is the

case here so that there is protection if, as here, "the request is being promulgated not to obtain relevant information, but 'with the precise goal of learning what the opposing attorney's thinking or strategy may be'" See *F.D.I.C. v. Wachovia Ins. Servs., Inc.*, 241 F.R.D. 104, 107 (D.Conn. 2007) (emphasis added).

It is because of such "conflicting decisions in the federal courts which have applied the federal discovery rule," that this Court in *Limstrom* expressly stated it rejects federal work product approaches in favor of "a bright-line rule" that "is consistent with our decisions." See 136 Wn.2d at 611 (emphasis added). This is why plaintiffs can cite no Washington case that has ever limited "ordinary work product" protection for documents gathered by counsel only to those that reveal "mental impressions" through a "selection process." Rather, in our state, "mental impressions" evidence is "absolutely protected" as "opinion work product" and "are almost always exempt from discovery, regardless of the level of need." See *Soter*, 162 Wn.2d at 739, 741, 744-45 (emphasis added). See also *Limstrom*, 136 Wn. 2d at 611-12. In contrast, the sole test for "ordinary work product" in our state turns simply on whether "the documents are part of the prosecutor's fact-gathering process" *Id.* at 611. See also *Koenig*, 151 Wn.App. at 230 (police reports and witness's statement "would not be subject to disclosure under the civil rule because it is a fac-

tual document gathered by the prosecutor in anticipation of litigation"); *Kleven*, 112 Wn.App. at 24) (Washington "includes within the definition of work product factual information which is collected or gathered by an attorney, as well as the attorney's legal research, theories, opinions and conclusions.") (emphasis added); 2007 Final Leg. Rep., SHB 1897, 60th Reg. Sess., at 175 (same).

Plaintiff's argument citing FOIA federal case law also is irrelevant for both this same reason, as well as because this Court and the Court of Appeals recognize the FOIA too "differs in many ways" from the PRA. *See Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 731, 748 P.2d 597 (1988); *Belo Mgmt. Servs., Inc. v. ClickA Network*, _ Wn.App. _, 2014 WL 6806880 at *4 (2014) (same). Thus, as was stated in *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn.App. 711, 730, 328 P.3d 905 (2014), the "federal case law [appellant] cites is not persuasive because our PRA differs from FOIA in important respects." *See also* AB 29-32.⁵

⁵ Citing *Shapiro v. U.S. Dep't. of Justice*, 969 F. Supp. 2d 18, 28 (D.D.C. 2013) (under federal law, unlike Washington PRA precedent cited above, *supra* at 11, 25-26, the "distinction made between fact and opinion work product in civil discovery is 'irrelevant' in the FOIA context"); *Am. Mgmt. Servs., LLC v. Dep't. of the Army*, 842 F. Supp. 2d 859 (E.D.Va. 2012) (no discussion of whether documents were part of an attorney's fact gathering for litigation); *Cities Serv. Co. v. F.T.C.*, 627 F. Supp. 827, 834 (D.D.C. 1984) (same); *Allen v. Chicago Transit Auth.*, 198 F.R.D. 495 (N.D. Ill. 2001) (addressing only if records were created for purposes of litigation, not if collected as part of fact gathering); *Binks Mfg. Co. v. Nat'l. Presto Indus., Inc.* 709 F.2d 1109, 1119 (7th Cir. 1983) (same); *Pac. Gas & Elec. Co. v. United States*, 69 Fed. Cl. 784, 796 (Fed.Cl. 2006) (same); *Gov't. of Virgin Islands v. Fahie*, 419 F.3d 249, 257 (3rd Cir. 2005) (same)).

ii) *Federal Discovery Cases Addressing Police Records Gathered for Prosecutorial Fact Finding Are Irrelevant*

Again ignoring Washington precedent, plaintiffs make the same argument based on the fact that various federal cases, relying on the aforementioned different federal test, have held police reports and other material in the hands of police would not be protected under federal work product analysis. *See* AB 34-36. This argument suffers from a similar fatal flaw as does plaintiffs' above reliance on the differing federal "selection" tests for work product – the federal cases cited do not support their argument and would be contrary to our state precedent if they did.

Thus, plaintiffs first cite *United States v. Fort*, 427 F.3d 1106, 1116 (9th Cir. 2007) – which actually protected police reports from disclosure even when sought from police – for its *dicta* that under the federal "work product doctrine, police reports are rarely protected." (citing *Miller v. Pancucci*, 141 F.R.D. 292, 303 (C.D. Cal. 1992); 6 James William Moore et al., *Moore's Federal Practice* § 26.70(c) (iii) (2006)). However, *Fort*, 427 F.3d at 1113, and all the other federal cases plaintiffs cite in support of this argument,⁶ involve records sought directly from the police

⁶ *See Miller v. Pancucci*, 141 F.R.D. at 303 (not concerning an attempt to obtain police reports from those an attorney had collected as part of fact gathering for purposes of litigation); *McCloskey v. White*, 2011 WL 6371869 (N.D. Ohio 2011) (same); *Joseph v. Las Vegas Metro. Police Dep't.*, 2011 WL 846061 (D. Nev., 2011) (same); *Heath v. F/V ZOLOTOL*, 221 F.R.D. 545, 549 (W.D. Wash. 2004) (same).

themselves, not attempts to fish through materials attorneys gathered in anticipation of litigation. AB 34-35. Thus, the federal cases are irrelevant.

Further, as repeatedly noted above, and repeatedly ignored by plaintiffs, Washington precedent is clear: though police reports are not work product when sought directly from police, *see e.g. Seattle Times Co. v. Serko*, 170 Wn.2d at 581 (addressing only "requests to the Pierce County Sheriff's Office (Sheriff) for various records held by the Sheriff related to the investigation") (emphasis added), they are protected as "ordinary work product" when sought from materials gathered by an attorney in anticipation of litigation. *See e.g. Limstrom*, 136 Wn.2d at 615 (police reports in prosecutor's files "are part of the prosecutor's fact-gathering process and are work product") (emphasis added); *Koenig*, 151 Wn.App. at 230 (police reports gathered in anticipation of possible prosecution of police officer not "subject to disclosure under the civil rule because it is a factual document gathered by the prosecutor in anticipation of litigation").

Plaintiffs disingenuously argue Washington's precedent means "parties could claim work product protection in regard to all investigative reports ... prepared by police or others prior to litigation – just because those documents are in a government lawyer's file." AB 36. Instead, under Washington's work product decisions – just as under federal precedent – plaintiffs can and indeed already have obtained all the requested police

reports they demanded through parallel PRA requests to involved police agencies. *See* CP 152. Under long-established Washington precedent, plaintiffs cannot also fish through the Prosecutor's litigation file to obtain documents it chose to gather and retain as part of its fact finding in anticipation of litigation – much less demand "attorneys' fees and penalties for ... wrongful withholding" materials they had no right to demand that it produce. AB 40.

D. PLAINTIFFS NEVER CLAIMED TO THE PROSECUTOR, MUCH LESS DEMONSTRATED TO THE TRIAL COURT, SUBSTANTIAL NEED AND INABILITY TO OBTAIN THE SUBSTANTIAL EQUIVALENT OF THE INVESTIGATIVE MATERIALS FROM OTHER SOURCES SUCH AS THE POLICE THEMSELVES

Plaintiffs – having mischaracterized the Prosecutor's position, the record about their requests, and Washington's work product law – lastly argue they can still obtain attorneys fees and penalties for being denied the Prosecutor's work product by simply arguing they had "substantial need of the materials" and were "unable without undue hardship to obtain the substantial equivalent of the materials by other means." AB 38. The law and the record are otherwise.

First, as a matter of law, the Prosecutors' work product cannot be compelled and protection of it punished merely because plaintiffs upon filing suit make for the first time mere assertions of a need and inability to

obtain it. Rather, this Court repeatedly has made clear that "ordinary work product" cannot be compelled "unless the person requesting disclosure demonstrates substantial need and an inability, without undue hardship, to obtain the documents or items from another source." *Limstrom*, 136 Wn. 2d at 611 (emphasis added). *See also e.g. Soter*, 162 Wn.2d at 748 (plaintiff "has not shown that substantially similar information could not have been obtained by other means without undue hardship"). Thus, as a matter of law, an "office invoking [work product] need not take steps to provide the documents unless the requester makes an affirmative showing of an inability to obtain the same documents elsewhere." *Koenig*, 151 Wn.App. at 233. Here, between the time they demanded the Prosecutors' work product and the time they sued for denying their demand, plaintiffs indisputably never even claimed to the Prosecutor that they had a substantial need and inability to obtain the substantial equivalent of its materials – much less made "an affirmative showing" of either. *See* CP 104-05, 111.

Second, the record and law affirmatively disprove plaintiffs' mere unsubstantiated arguments alleging any substantial need and inability to obtain a substantial equivalent of the investigation materials elsewhere.

As to their recently alleged claim of "substantial need," plaintiffs only argue that such was present because they "were trying to learn why the police had killed their son" and "wanted to test officer's account of

what happened" before the Prosecutor made its charging decision without their assistance. AB 38. As a factual matter, the undisputed record instead shows plaintiffs did learn the reasons for the shooting long before their August 5, 2013, PRA request to the County – and indeed had obtained police materials before both that date and their October 2013 follow-up letter. *See* CP 152. Further, as a matter of law, "want[ing] to be sure nothing has been overlooked" or "the passage of time alone is insufficient to allow discovery" of work product. *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 401-02, 706 P.2d 212 (1985). Instead, the "substantial need" test requires a "party must show the importance of the information to the preparation of his case and the difficulty the party will face in obtaining substantially equivalent information from other sources if production is denied." *Id.* at 401 (emphasis added).

Second, plaintiffs' merely alleged "inability" to obtain the records or their substantial equivalent elsewhere" is likewise baseless. Even viewing *arguendo* plaintiffs' October 2013 follow-up letter as a "renewed" PRA request made at a time when RCW 42.56.240(1) alone no longer barred their demand, the record is undisputed that by then the materials were available elsewhere as a matter of law because by that date the "effective law enforcement exemption" could not and was not asserted by police since the Prosecutor's charging decision had already been made. *See*

Sargent, supra; AB 9; CP 96, 99, 152, 161, 189.⁷ Though plaintiffs try to avoid this by oddly switching their argument to address the time frame of their August 2013 PRA request, AB 38, it has been shown the Prosecutor's denial at that time was independently exempted from compelled disclosure by RCW 42.56.240(1) from the Prosecutor as well, *see supra* at 13-16 – a ground that is not contested as an issue in plaintiffs' appeal. AB 3-5.

In any case, even at the time of their one and only PRA request in August of 2013 – which also was independently barred by RCW 42.56.240(1) – plaintiffs still had the ability to obtain their substantial equivalent because a "statement of a person contained in work product materials" will be protected where the declarant is available to the party. *See Heidebrink*, 104 Wn.2d at 402. *C.f. State v. Brown*, 68 Wn.2d 852, 861, 416 P.2d 344 (1966) ("There is no showing in the record that the [plaintiffs] attempted at any time to interview any of these officers" so the Court "cannot assume that the officers would have failed to relate to the defendant's counsel the complete result of their investigation of the case at such an interview"). There is no evidence in the record that the authors

⁷ Plaintiffs claim it was not until "well after" the Prosecutor's October 7, 2013, response to their request for clarification "that some of the municipal police agencies began responding" to their PRA requests, is not only unsupported by any citation to the record, see AB 39, but shown by it to be baldly untrue. *See* CP 152 (listing "6/12/2013; ... 8/13/2013 ... 5/24/2013" as among dates police reports were received by plaintiffs from other sources before the Prosecutor's October 7, 2013, response). *See* also CP 113.

and other sources of the investigative materials were unavailable to plaintiffs at any time.

V. CONCLUSION

Plaintiffs' appeal does not dispute that their August 2013 PRA request was properly barred by RCW 42.56.240(1). The record and this state's precedent is clear that this request – and any factually baseless allegation about a supposed later October 2013 PRA request – would be barred also by Washington's "ordinary work product" protection. Thus, this appeal is wholly without merit and Pierce County respectfully requests this Court affirm the trial court's order dismissing plaintiffs' PRA suit against its Prosecutor.

DATED this 9th day of February, 2015.

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CERTIFICATE OF SERVICE

On February 9, 2015, I hereby certify that I delivered a true and accurate copy of the foregoing PIERCE COUNTY'S ANSWERING BRIEF to ABC Legal Messengers with appropriate instruction for same-day delivery to the following:

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OFFICE RECEPTIONIST, CLERK

To: Christina Smith
Cc: Dan Hamilton
Subject: RE: Thomas v. Pierce County, No. 90195-3, Motion for Extension of Time

Received 2/9/15

From: Christina Smith [mailto:csmith1@co.pierce.wa.us]
Sent: Monday, February 09, 2015 1:30 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Dan Hamilton
Subject: Thomas v. Pierce County, No. 90195-3, Motion for Extension of Time

Clerk of the Court,

You will please find attached "Pierce County's Answering Brief" in the matter of Fredrick and Annalesa Thomas v. Pierce County, WA Supreme Court No. 90195-3, filed on behalf of Defendant-Respondent Pierce County. A hard copy will be provided to opposing counsel via ABC Legal Messenger as indicated on the certificate of service.

Thank you.

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