70901-1

70901-1

NO. 70901-1-I

In the Court of Appeals of the State of Washington
Division 1

JEFFREY R. MCKEE, Appellant

v.

KING COUNTY, Respondent

APPELLANT'S BRIEF

Christopher Taylor
Attorney for Appellant
FT Law, P.S.
402 Legion Way SE Ste 101
Olympia, WA 98501
Voice: (360) 352-8004
Fax: (360) 570-1006
Email: taylor@ftlawps.com

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Cases:

A) ASSIGNMENT OF ERROR

The trial court erred by granting respondent-defendant King County's CR 56 motion for summary judgment and dismissing *McKee v. King County*, Snohomish County Superior Court Case No. 12-2-08128-8 with prejudice.

B) ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. King County Wrongfully Withheld Jail Records.
2. King County Should Have Redacted, Not Withheld, Emails.
3. Trial Court Abused Discretion in Declining to Examine In Camera.

C) STATEMENT OF THE CASE

1. On November 29, 2012, Appellant Jeffrey R. McKee filed a Public Records Complaint against Respondent King County under Snohomish County Superior Court Case No. 12-2-08128-8, alleging "Plaintiff submitted a PRA request and defendant failed to respond within the terms and timeframes of the PRA." CP 89-90.
2. Mr. McKee attached a Declaration to the Complaint identified in Paragraph 1 that clarified the request at issue was in the form of a letter dated April 1, 2011, addressed to "Kristie Johnson" of the "King County Prosecuting Attorney Office." CP 92, 96. The letter requested "[t]he complete case file in State v. McKee, King County Superior Court Cause No. 03-1-01734-1 KNT," as well as more

specific requests for "audio and/or video recordings," "deals made and/or agreements made and/or payments made to any of the alleged victims" and "phone recordings" related to the same case. CP 96.

3. On April 13, 2011, "Myralynn Nitura" sent a letter to Mr. McKee on behalf of "Kristie Johnson," the "Public Records Officer" for the King County Prosecuting Attorney's Office that indicated she had "identified 2 banker boxes of material" "[i]n response to your request for "the complete case file," estimating that because "[o]n average a banker box contains approximately 2000 pages of documents," there were approximately 4000 pages of records responsive to one aspect of Mr. McKee's request. Ms. Nitura did not address how many non-paper records—e.g. the "audio and/or video recordings" and "phone recordings" specifically requested, or records maintained in an electronic format—were identified, except to indicate the materials actually identified "are not available in an electronic format at this time." CP 98.
4. Over the next few months, issues related to copying and scanning costs were discussed by letter between Mr. McKee and King County. CP 98, CP 102, CP 104, CP 110, CP 112, CP 114, CP 116, CP 118.

5. On December 27, 2011, M. Nitura—now identified as the "Interim Public Records Officer" for the King County Prosecuting Attorney's Office—indicated in a letter to Mr. McKee it had "identified 2177 pages of documents that are responsive to [Mr. McKee's] request." King County also indicated "[f]rom those 2177 pages, we have redacted social security numbers, non-conviction data, and withheld attorney work product, NCIC printouts, jail documents, and domestic violence advocate emails" and "included a formal privilege log for all of the items redacted or withheld." CP 114, CP 54-59.
6. The "formal privilege log" identified in paragraph 5 identified 44 records—of varying page lengths, ranging from one page to 50 pages. CP 55-59.
    a) The first four records appear to have been reports generated by the King County Sheriff's Office, and were not withheld, but were redacted to remove a particular individual's social security number. CP 55.
    b) The fifth record is identified as 16 pages of "Westlaw Printouts," and were withheld as exempt "attorney work product" pursuant to "RCW 42.56.290 and *Limstrom v. Ladenburg*, 136 Wn.2d 595 (1998). CP 55.

c) The sixth record is identified as a "Curriculum Vitae" with "Attorney Handwritten Notes Redacted" as "attorney work product." CP 55.

d) The seventh through thirteenth records were identified as "Memo[randa]," "Notes," and a "Filing Unit Worksheet," each of which were withheld as "attorney work product." CP 55-56.

e) The 14th through 38th records were identified as emails, each of which were withheld as "attorney work product." CP 56-59.

f) The 39th record was identified as "KCDAD Booking Sheets," and was withheld as a "[j]ail record" pursuant to "RCW 70.48.100." CP 59. This record was apparently later produced on July 10, 2013. CP 23.

g) The 40th record was identified as an "NCIC" and was withheld pursuant to "28 U.S.C. § 534 and 28 C.F.R. § 20(c)." CP 59.

h) The 41st through 44th records were identified as emails, and each of which were withheld pursuant to "RCW 5.60.060(8)." CP 59. Later, King County acknowledged RCW 5.60.060(8) only concerns "communications between a victim advocate and a victim." CP 21-22. However, King County then impliedly substituted or supplemented its privilege log by claiming these emails were withheld as "attorney work product." *Id.*

7. On June 17, 2013, King County, by and through counsel, moved pursuant to CR 56 to dismiss *McKee v. King County*, Snohomish County Superior Court Case No. 12-2-08128-8. CP 73-82.
8. On August 21, 2013, the Court "granted" King County's "motion for summary judgment dismissal" and ordered that "[a]ll remaining claims against [King County] in this action are dismissed with prejudice." CP 5-6. The Court considered the "Declaration of Kristie Johnson with attached exhibits," the "Declaration of Jeffrey R. McKee with attached exhibits," and the "Declaration of Janine Joly." CP 5. The Court did not consider any live witness testimony or any in camera review of any records. *Id.*
9. On September 19, 2013, Mr. McKee, while an inmate at Coyote Ridge Corrections Center, signed, dated, and placed a Notice of Appeal in the Washington State Department of Corrections' internal mail system. CP 1. The Notice of Appeal was filed with the Court on September 25, 2013. CP 1.

D) ARGUMENT

"Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court...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." RCW 42.56.550. "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." *Id.*

"Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo." RCW 42.56.550(3). "The court may conduct a hearing based solely on affidavits." *Id.* "[W]here the record consists only of affidavits, memoranda of law, and other documentary evidence," "the appellate court stands in the same position of the trial court." *Progressive Animal Welfare Soc. v. Univ. of Wash. (PAWS* II), 125 Wn.2d 243, 252 (1994). "Under such circumstances, the reviewing court is not bound by the trial court's findings on disputed factual issues." *Id.* at 253. Also, more particularly, "[g]rants of summary judgment are reviewed de novo." *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 715 (2011).

Here, the trial court "considered defendant's motion, Declaration of Kristie Johnson with attached [documentary] exhibits, and the Declaration of Janine Joly with attached [documentary] exhibits; plaintiff's response with the Declaration of Jeffrey R. McKee with attached [documentary] exhibits; [and] defendant's reply with the Second Declaration of Janine

Joly." CP 5. Thus, this Court is not bound by the trial court's findings on disputed factual issues, and should review issues of law de novo.

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c). The court must consider "facts and reasonable inferences in the light most favorable to the nonmoving party." *Building Indus. Assn. of Wash. v. McCarthy*, 152 Wn. App. 720, 735 (2009). "A material fact is a fact upon which the outcome of the action depends." *Id.* "The moving party bears the initial burden of showing the absence of an issue of material fact." *Id.* "If a defendant movant meets this burden, the plaintiff must respond by making a prima facie showing of the essential elements of its case" in the form of "competent evidence by affidavit or otherwise." *Id.*

1. King County Wrongfully Withheld Jail Records.

The Public Records Act "mandates that agencies disclose requested [records] unless it falls under a PRA exemption or is exempt under another statute." *Sargent v. Seattle Police Dept.*, 167 Wn. App. 1, 20 (2011). Generally, "the records of a person confined in jail shall be held in confidence." RCW 70.48.100(2). However, jail records "shall be

made available... (f) Upon the written permission of the person." *Id.* "[W]hen the subject of [jail] records seeks their disclosure" under the Public Records Act, the request "amounts to a [written] grant of permission." *Sargent*, 167 Wn. App. at 20. The grant of permission is inherent in the Public Records Act request, even if "the request was signed not by [the subject of the jail records] but by his attorney." *Id.* Thus, a claim of exemption under RCW 70.48.100 for jail records where the requester is the subject of the records is "improper." *Id.*

Here, King County withheld "KCDAD Booking Sheets" dated June 30, 2003 that concerned "Jeffrey McKee." CP 59. King County cited "RCW 70.48.100" as the statute allowing an exemption, and explained "[j]ail records are exempt from disclosure." *Id.* In other words, King County did precisely what *Sargent* described as improper.

Apparently King County's rationale was that it was waiting for another document separate from Mr. McKee's public records request that evidenced his written permission. *See* CP 23. And when Mr. McKee "expressed the intent to give the written permission referenced in RCW 70.48.100(d)"—presumably in the form of Mr. McKee's Response on July 5, 2013, which indicated the written "permission was given when Mr. McKee made the records request"—King County "mailed the jail record to [Mr. McKee] along with [its] reply" on July 10, 2013. CP 23, 29, 16.

Based upon the reasoning in *Sargent*, King County clearly wrongfully withheld the jail records based upon a flawed understanding of RCW 70.48.100, at least between December 27, 2011 and July 10, 2013. Therefore, the trial court's granting of summary judgment in favor of King County was inappropriate.

2. King County Should Have Redacted, Not Withheld, Emails.

Ordinarily "the exemptions" of the Public Records Act "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." RCW 42.56.210(1). And "*all* exemptions," whether "categorical" or "conditional," "are intended to protect personal privacy and government interests." *Resident Action Council v. Seattle Housing Auth.*, 177 Wn.2d 417, 300 P.3d 376, 386 (2013) (emphasis in original). That is, "[i]n general, the Public Records Act does not allow withholding of records in their entirety." *PAWS* II, 125 Wn.2d at 261. "Instead, agencies must parse individual records and must withhold only those portions which come under a specific exemption." *Id.*

"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 under" the Public Records Act. RCW 42.56.290. "Any 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 v. Cowles Publishing Co.*, 162 Wn.2d 716, 731 (2007). "This exemption from public disclosure relies on the rules of pretrial discovery to define the parameters of the work product rule for purposes of applying the exemption." *Id.* (internal citation omitted). "[T]he mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation" are subject to the work product rule, and are almost invariably not discoverable. CR 26(b)(4), *Soter*, 162 Wn.2d at 740. Moreover, "[t]he notes or memoranda prepared by [an] attorney from oral communications" with witnesses are also similarly exempt from discovery under the work product rule. *Id.* Furthermore, "documents and tangible things...prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney...)" are only discoverable "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." CR 26(b)(4), *Soter*, 162 Wn.2d at 740.

However, "a document containing attorney work product may be exempted as a record that would not be available under the rules of pretrial

discovery...but redaction might transform the record into one that that actually would be available in pretrial discovery, and thus, into a different type of record—one that no longer falls under the relevant exemption and which would have to be disclosed in a redacted form." *Resident Action Council*, 300 P.3d at 382.

a) Only Body of Email Arguably Work Product.

Here, King County identified 29 emails upon which it claimed a work product exemption[1]. CP 56-59, 21-22. Each of these emails were capable of being redacted to remove attorney work product. At the very least, each email could have been produced with the body of the email redacted, leaving the email's author, the intended recipients, the subject, and the date in tact. Indeed, King County has already impliedly conceded this by actually disclosing all this information in another form, on its privilege log and in the Declaration of Janine Joly. *See* CP 56-59, 21-22.

[1] Four emails were originally exempted by reference to RCW 5.60.060(8), which indicates "A domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate." In other words, this exemption only conditionally applies to communications between a domestic violence advocate and a victim. The four emails at issue constituted emails between a victim advocate—Tabitha Yockey—and King County Deputy Prosecuting Attorney Patrick Cook and his paralegal Holly Gilmore. CP 59, 25. Even if Ms. Yockey constituted a "domestic violence advocate" as the term is defined in RCW 5.60.060(8)(a); and even if the statutory "consent," "clear, imminent risk," and mandatory reporter exceptions did not apply; and even if disclosing emails constituted an "examin[ation];" this exemption clearly does not apply because the records at issue do not directly involve "any communication between the victim" and anyone else.

b) Fact-Gathering Through Law Enforcement Not Automatically Subject to Work Product Rule.

Furthermore, four of the emails were authored by law enforcement. CP 57-59. Specifically, the 19th record identified in the privilege log was authored by King County Sheriff's Office Detective Christina Bartlett; the 28th record was authored by City of Kent Police Department Officer Wayne Himple; the 31st record was authored by City of Kent Police Department Officer Sue Peters; and the 38th record was authored by City of Federal Way Police Department Officer Pam Hall. CP 57-59, 26. Each of these four emails were described by King County as "responses" to "attempts by the attorneys and paralegal to gather factual information for trial." CP 26.

"As to protection of the trial process...not even prosecution files are categorically exempt from disclosure." *Cowles Publ. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 478 (1999). "Instead, documents are protected from disclosure to the extent they are attorney 'work product' under the civil discovery rules." *Id.* "Generally, nothing in a police investigative file would be considered attorney work product." *Id.* Although "work product is not limited to material prepared by the attorney [and can] include[] material prepared on behalf of the attorney by an

investigator," "a law enforcement agency is [not] merely an arm of the prosecutor's office for purposes of a work product analysis." *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 592 (2010). Thus, the fact that an email from a law enforcement officer is authored in response to a request from a prosecuting attorney does not end the analysis.

For example, if a prosecuting attorney were to request that a law enforcement officer ask a particular witness a particular question, this request almost certainly is work product, in the sense that the fact of and phrasing of the question may reveal the attorney's thoughts, strategies, or mental impressions. Furthermore, the response by law enforcement, assuming it is targeted to the request, likely is also work product, in the sense that the response itself may reveal the same information. *See Limstrom v. Ladenburg*, 136 Wn.2d 595, 614 (1998). If, however, a prosecuting attorney were to request that a law enforcement officer interview a particular witness—particularly where there is no indication as to why the request is being made, or suggestions on how to conduct the interview—the request may be work product, but the response is likely not, especially if it took the form of a supplemental report that was incorporated into the police investigative file.

King County had the burden of demonstrating the applicability of the work product exemption regarding records 19, 28, 31, and 38. The

brief description contained in the privilege log as to each of these four emails only indicates "This email shows legal opinions, mental impressions or conclusions of an attorney and is considered work product." CP 57-59. The explanation contained in the Declaration of Janine Joly only indicates these four emails were "responses" to "attempts by the attorneys and paralegal to gather factual information for trial." CP 25. King County simply failed to meet its burden of demonstrating these four emails were wholly exempt from disclosure under the Public Records Act, and thus summary judgment was inappropriate.

c) Communications with Domestic Violence Advocate Not Work Product.

Moreover, two of the emails were authored by a victim advocate, and two were authored by an attorney and directed to that victim advocate. CP 59, 25. Specifically, the 41st and 43rd records identified in the privilege log were authored by "Tabitha Yockey, the victim advocate assigned to work with victims in *State v. McKee*." *Id.* And the 42nd and 44th records were authored by King County Prosecuting Attorney Patrick Cook, and directed to Ms. Yockey. *Id.* These four emails apparently "show an exchange of information between [King County Prosecuting Attorney] Patrick Cook and Ms. Yockey concerning the victims' participation in the trial." CP 25. One of the emails also "contain[ed] a direction from Mr.

Cook to [his paralegal] Ms. Gilmore regarding Mr. Cook's request for additional information." *Id.*

Presumably, by initially claiming the exemption under RCW 5.60.600(8), King County is conceding Ms. Yockey is a "domestic violence advocate." CP 59. A "domestic violence advocate...means an employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to victims of domestic violence and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office, or the child protective services section of the department of social and health services." RCW 5.60.060(8)(a). A "domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate." RCW 5.60.060(8). Therefore, the emails between Mr. Cook and Ms. Yockey could not have concerned communications between Ms. Yockey and a victim. Therefore, the "exchange of information between Mr. Cook and Ms. Yockey concerning victims and the victims' participation in the trial" must have involved something other than communications between Ms. Yockey and a victim. It is unclear, then, how these emails could be properly characterized as "documents...prepared in anticipation of

litigation or for trial...by or for th[e] other party's...attorney." CR 26(b)(4). Perhaps the "request for additional information" from Mr. Cook to his paralegal Ms. Gilmore constituted work product, but the whole of the emails does not so constitute, and should have been produced, with or without redactions, and thus summary judgment was inappropriate.

3. Trial Court Abused Discretion in Declining to Examine In Camera.

"Courts may examine any record in camera in any proceeding brought under" the Public Records Act. RCW 42.56.550(3). "Normally, determining whether in camera inspection is required is left to the discretion of the trial court." *Overlake Fund. v. City of Bellevue*, 60 Wn. App. 787, 796-97 (1991). However, "when the court cannot evaluate the asserted exemption without more information than that contained in the government's affidavits," "in camera review [may be] necessary." Id. at 797. Indeed, "[t]he only way a court can accurately determine what portions of a file may be exempt from disclosure as work product is by an in camera review of the file." *Barry v. USAA*, 98 Wn. App. 199, 208 (1999) (citing *Limstrom*, 136 Wn.2d at 615).

Here, the trial court declined to conduct an in camera review of the records in question. *See* CP 5-6. The trial court declined an in camera review despite the fact that Mr. McKee requested such a review, and King

County "provided the documents along with the *in camera* index...to the court." CP 17-18, 28.

King County's only explanation as to how the email records were subject to being withheld, as opposed to redacted, under the work product exemption comes from the initial privilege log, as well as the Second Declaration of Janine Joly. CP 55-59, 24-25. King County's conclusory explanations in the former—"This email shows legal opinions, mental impressions or conclusions of an attorney and is considered work product"—does not provide the court with sufficient information to evaluate the scope of the work product exemption as applied to each email. CP 57-59. Ms. Joly's Declaration provides more detail, indicating some of the emails at issue "describe the criminal allegations against defendant, aspects of the continuing investigation, the arrest, and the possible charges;" others evidence "attempts by the attorneys and paralegal to gather factual information for trial and the responses" to those attempts; and others "show an exchange of information between [an attorney] and [a victim advocate] concerning victims and victims' participation in trial." CP 25. Nevertheless, the level of specificity with respect to each email—especially those not authored by attorneys or their staff—could not allow the court to effectively evaluate the applicability of the claimed work product exemption. Therefore, it was an abuse of

discretion to decline to conduct an in camera review of the records. And therefore, summary judgment was inappropriate.

E) CONCLUSION

King County wrongfully withheld jail records under RCW 70.48.100 because they actually had written permission from Mr. McKee to release the records, rendering the exemption inapplicable. Furthermore, King County withheld a number of emails, all of which were capable of being redacted and thereby transformed into records that did not contain work product, thus rendering the exemption under RCW 42.56.290 inapplicable. Finally, the trial court abused its discretion, given the lack of information provided by King County as to how the work product exemption applied to the emails, in declining to review the emails in camera. For these reasons, the trial court erred in granting summary judgment, and this court should reverse and remand for further proceedings.

DATED this 4th day of August, 2014.

Christopher Taylor, WSBA # 38413
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPELLANT'S BRIEF was delivered this 4 day of August, 2014 to ABC Legal Messengers, with appropriate instructions to forward the same to counsel for the Respondent as follows:

Janine E. Joly
King County Prosecuting Attorney's Office
900 King County Administration Bldg
500 4th Ave
Seattle, WA 98104-2337

Christopher Taylor