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NO. 94109-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL MOCKOVAK,

Petitioner,

v.

KING COUNTY and KING COUNTY PROSECUTING ATTORNEY'S OFFICE,

Respondents.

KING COUNTY AND KING COUNTY PROSECUTING ATTORNEY'S OFFICE ANSWER TO MEMORANDA OF AMICUS CURIAE

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I. INTRODUCTION

The National Lawyers Guild, Washington Coalition for Open Government and Allied Daily Newspapers of Washington (collectively "Guild Amici") and Washington Association of Criminal Defense Lawyers ("WACDL") urge this Court to clarify the PRA obligations of joint federal-state task forces. This issue is not, however, presented by this Public Records Act ("PRA") case against King County.

II. STATEMENT OF THE CASE

King County and the King County Prosecuting Attorney's Office (collectively "the PAO") respectfully incorporate by reference the Statement of Facts set forth in their Answer to Mockovak's Petition for Review ("Answer").

III. ARGUMENT

A. No Issue Is Presented Regarding The PRA Obligations of Seattle Police/FBI Joint Task Force.

Amici's interest in clarifying PRA obligations of joint federal-state task forces is fundamentally misdirected at this case. WACDL erroneously asserts that, "in response to a PRA request, … an agency withheld and redacted responsive records at the direction of a local federal official." WACDL Brief at p. 1. Based on this

misunderstanding, WACDL asks the Court to "clarify the PRA obligations of joint federal-state task forces." *Id.* at p. 10. Guild Amici similarly urge review of whether, under the PRA, a local federal official has the power to prohibit a city police officer from producing joint federal/state task force investigation records. Amici Memorandum at p. 1.

This case involves no PRA request to, no PRA response by and no PRA claim against any task force, task force member, city or city police officer. The only PRA request at issue here was made to the King County Prosecutor. (CP 44) Records disclosed and redacted in response to that PRA request were from the PAO alone and did not involve direction or interference from any federal official or task force participant. (CP 54-70)

B. Amici Do Not Urge Review of The PAO's Response to Mockovak PRA Request.

In response to Mockovak's PRA request for Kultin-related records, copies of all responsive PAO documents were either made available to Mockovak or identified as withheld or redacted on PAO exemption log sheets. (CP 54–131, 163) Mockovak challenged the appropriateness of 81 of these redactions. (CP 355-406, 756–870)

Following its careful *in camera* review of challenged documents submitted under seal, the Court of Appeals confirmed that the PAO's redactions consisted of mental impressions of council entitled to near absolute attorney work product protection and included no immigration-related fact that Mockovak was not previously made aware of in his criminal case discovery. Unpublished Opinion at pp. 35–38.

Amici do not seek review of any aspect of the Court of Appeals' decision affirming the validity of attorney work product exemptions asserted by the PAO.[1] Rather, their support for review is premised on an incorrect assumption that Mockovak's PRA request was made to or denied by Seattle Police or FBI task force participants.

Because Mockovak's effort to obtain task force participant documents in this case was based, not on any PRA request, but, rather, on his discovery demand to Agent Carver, this case simply does not illustrate the concerns of Amici regarding potential federal task force interference in a PRA response.

[1] While Mockovak seeks review of PAO work product redactions based on alleged burden shifting and common interest notions, *see* Answer at pp. 14-17, Amici do not reference either of those issues.

C. Generalized Criminal Discovery Concerns Are Not Illustrated by The Context Of This Case.

This PRA case is likewise not an appropriate vehicle for addressing more generalized concerns of Guild Amici regarding the potential for federal task force interference in criminal case discovery. Amici Memorandum at pp. 8-10. This is, of course, not a criminal case. If discovery violations occur in a particular criminal matter, trial and appellate courts are well-equipped to review the full and complete context in which the dispute arises and to fashion an appropriate discovery remedy to address any impropriety. Indeed, Mockovak invoked such remedies in his own criminal case. His criminal discovery motion to compel disclosure was not, however, pursued after he was able to obtain and review task force documents and to interview task force officers. PAO Appeal Brief at pp. 1-3, 25-28. Mockovak readily acknowledged to the Court that all relevant Kultin-related information was provided to him. *Id.*

While discovery in criminal matters can no doubt also be augmented by public records or FOIA requests to a task force or its participants, as noted above, this case involves neither any public records request to a task force or task force participants nor any task force influence in the PAO's public records response.

D. Generalized Criminal Discovery Concerns Are Not Illustrated by The Review Issues Urged In This Case.

The discovery review issues urged by Mockovak likewise do not present an appropriate context for addressing Guild Amici's generalized task force discovery concerns. Mockovak's discovery dispute is based upon the Department of Justice ("DOJ") decision to deny his *Touhy* request and oppose his motion to compel discovery of Agent Carver, in large part because such discovery was wholly unrelated to his PAO work product redaction challenge. Without even reaching Mockovak's proposed Tenth Amendment and *Touhy* review issues,[2] the decision to deny Carver discovery was independently supported by both CR 26 materiality thresholds and sovereign immunity principles, for which review is not sought.

Discovery of Carver had no bearing on the narrow, remaining issue in this case. By the time discovery and summary judgment motions were filed, Mockovak's sole unsettled claim was a challenge to the validity of work product redactions identified on

[2] Carver is a City of Seattle (not King County) police officer who was sworn and deputized as a federal marshal. (CP 298, 1277) Carver's full time official duties regarding the Mockovak matter were devoted to a federal joint task force investigation for which he was under the day to day supervision and control of the FBI. (CP 1277) Mockovak's Tenth Amendment and *Touhy* review claims are addressed at pages 8 to 13 of the PAO's Answer.

the PAO's exemption log. CP 346-48 (Offer of Judgment accepted by Mockovak as to all claims except "plaintiff's claim that defendants improperly redacted or withheld certain documents identified on defendants' October 29, 2014 exemption log.") Mockovak's redaction challenge was ultimately directed at 81 particular documents. CP 355 – 406 and 756 – 850.

Efforts to undertake discovery of Carver had no material bearing whatsoever on the validity of any of the 81 PAO attorney work product redactions at issue. Indeed, neither Mockovak's discovery motion (CP 1180-93, 1298-1304) nor Touhy submittal (CP 920-24) purports to make any connection between requested discovery and any unsettled work product issue. While discovery is broad, it must bear a CR 26 relationship to the claims that are at issue in the case. *See Neighborhood Alliance v. County of* Spokane, 172 Wn.2d 702, 716, 261 P.3d 119 (2011). Mockovak's proposed discovery did not. As such, independent of *Touhy* and sovereign immunity justifications asserted by the DOJ below, rejection of Carver discovery in the particular context of this case is thus readily supported by straightforward civil discovery limitations that afford trial courts discretion to narrow discovery to matters material to the issues arising in the PRA lawsuit. *See* CR 26(b)(1)

(discovery allowed "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...").

Similarly, denial of Carver discovery was affirmed by the Court of Appeals based on sovereign immunity grounds that are not among the determinations for which Mockovak has sought review. *See* Answer at pp. 13 to 14. Accordingly, even if, for argument sake, there was merit to Mockovak's 10th Amendment and *Touhy* review issues, there would be no proper basis for review because the denial of Mockovak's discovery motion would stand on independent and unchallenged sovereign immunity grounds.

IV. CONCLUSION

Neither the factual nor legal context of this case provides an appropriate RAP 13.4 vehicle for reviewing concerns expressed by Amici. King County therefore respectfully requests that Mockovak's petition for review be denied.

DATED this 5th day of May, 2017.

Respectfully submitted,

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Certificate of Service

Today I directed via the method indicated below addressed to the attorneys listed below, a copy of the **KING COUNTY AND KING COUNTY PROSECUTING ATTORNEY'S OFFICE ANSWER TO MEMORANDA OF AMICUS CURIAE** in *Michael Mockovak v. King County, et al.,* Cause No. 94109-2, in the Supreme Court of the State of Washington.

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

Margaret Flickinger
Done in Seattle, Washington

5/5/2017
Date