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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FREDRICK AND ANNALESA THOMAS,

Plaintiff-Appellants,

v.

PIERCE COUNTY PROSECUTING ATTORNEY'S OFFICE,

Defendant-Appellee.

REPLY BRIEF OF APPELLANTS

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I. REPLY ARGUMENT

Defendant Pierce County Prosecuting Attorney's Office ("the Prosecutor's Office") defies every applicable canon of construction and legislative mandate under Washington's Public Records Act (PRA), RCW 42.56, in withholding as "work product" the requested investigative reports, witness statements, and other documents, that were routinely and independently created by third-party municipal police agencies in connection with the officer-involved killing of Leonard Thomas.

PRA jurisprudence holds that agencies should broadly construe requests and narrowly construe exemptions in favor of disclosure. *See Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 522, 326 P.3d 688 (2014). Consistent with and additional to PRA standards, the law of evidence holds that privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *State v. Maxon*, 110 Wn.2d 564, 567, 569, 756 P.2d 1297 (1988) (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)). Yet contrary to both standards, Defendant reads the scope of work product protections as broadly as possible to include third-party police reports and other documents that its investigator (Keith Barnes) had no hand in creating or assembling in any meaningful way that could betray any mental impressions in the Prosecutor's Office.

This Court's plurality decision in *Limstrom v. Ladenburg* held that reports created by or received from the Pierce County Sheriff's Office were "documents . . . part of the prosecutor's fact-gathering process and

are work product.” 136 Wn.2d 595, 614, 963 P.2d 869 (1998). Yet again, despite the canon that a plurality’s holding should be only that “taken by those concurring on the narrowest grounds,” *State v. Zakel*, 61 Wn.App. 805, 808, 812 P.2d 512 (1991), Defendant reads *Limstrom* as expansively as possible to encompass such third-party documents created in the ordinary course of business. Defendant does so by expanding the concept of “fact-gathering” to include here reports posted to the RMS intranet site, which reflect facts *already gathered by independent municipal police*, and in the case of Fife, notebooks that Detective Thomas Gow described as “a complete copy of the Fife Police Department’s investigation file.” CP 163-64. Or, as the trial court rightly observed, Defendant extends *Limstrom*’s “fact-gathering” to circumstances where “there is no question in this case that there was no gathering in any meaningful way.” RP, 17:11-12.

Washington law holds that records created in the ordinary course of business are not work product. *See Morgan v. Federal Way*, 166 Wn.2d 747, 754, 213 P.3d 596 (2009). Washington and federal law also hold that such documents are thus discoverable under the rules of civil procedure. As Defendant notes, the contours of the work product doctrine for purposes of the PRA are congruent with what materials would be available under civil discovery. *See Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 740-41, 174 P.3d 60 (2007).

Under this authority, the requested police records, created independent of the Prosecutor’s Office in the ordinary course of business, fall outside work product protection and would be discoverable under the

civil rules. Defendant cannot skirt that principle, based on an expansive application of *Limstrom*, to argue that its Investigator may co-opt the fact-gathering of municipal police and withhold records that would be available in a civil suit, and in a criminal case against the shooter if the Prosecutor had decided to file charges.

A. Plaintiff's October 3, 2013 request and Defendant's claimed work product protection are the only issues in question.

Plaintiff's Petition for Direct Review concerns a request under the PRA for investigative reports, witness statements, and other documents about the Thomas shooting, routinely and independently created by third-party municipal police agencies in the ordinary course of business and then handed over as a matter of routine to the Prosecutor's Office.

1. The October 3, 2013 request is at issue.

Plaintiffs first requested these records on August 5, 2013. CP 104-05. They did so after the municipal police agencies themselves (except Milton) refused to provide them under the "law enforcement exemption," RCW 42.56.240(1). CP 159-62. In light of these denials, Defendant is incorrect that Plaintiffs "had obtained much of these materials from the police before both their PRA request to the Prosecutor as well as before making the charging decision." RB at 6.

On September 3, 2013, the day before the Prosecutor's Office announced the shooting to be "justified" (CP 34-35), its public records officer notified Plaintiffs that it was withholding the requested records. The Prosecutor's Office claimed under RCW 42.56.240(1) that

“nondisclosure” was “essential to effective law enforcement or for the protection of any person’s right to privacy,” CP 107-09; and that “a prosecutor’s office is afforded a work-product privilege regarding any materials gathered in anticipation of a litigation decision.” CP 108.

The relevant request here arose on October 3, 2013 when Plaintiff contacted the Prosecutor’s Office to inquire whether its claimed work product and law enforcement exemptions were still in “effect” after the decision to file no criminal charges. *See* CP 111 (“Would you please 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 . . . ?”).

The trial court correctly deemed this to be a new request:

The Court makes two observations: (1) The October 3, 2013 letter was unclear, inartful, and lent itself to confusion; *but*, (2) Any such request related to records under the PRA should have been broadly interpreted per the intent of the legislature. For purposes of this Order, *the Court finds that the October 3, 2013 letter constituted a subsequent PRA request.*

CP 213-14 (emphasis added).

Defendant attacks Plaintiff for allegedly “mischaracterizing” this request (RB at 5-6, 16-18), but does not argue the trial court’s finding was inconsistent with the PRA’s mandate that a responding agency should broadly construe requests. *See* RCW 42.56.030 (PRA “shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.”); Wash. Admin. Code 44-14-01003 (“The act emphasizes three separate

times that it must be liberally construed to effect its purpose, which is the disclosure of nonexempt public records.”).

Defendant seizes on the trial court’s view that the request was “inartful” and “lent to confusion” (RB at 8); yet that description does not disqualify it as a valid request for purposes of determining liability. Rather, any lacking clarity to the request is a “mitigating factor” the trial court would consider in “decreas[ing]” penalties. *Yousoufian v. Office of Ron Sims*, 168 Wn. 2d 444, 467, 229 P.3d 735, 748 (2010).

2. RCW 42.55.240(1)’s “law enforcement” exemption is not material to this appeal.

With the October 3, 2013 request in mind, the only basis for withholding at issue before this Court is whether the work product doctrine should shield these records. As the trial court noted, an exemption under RCW 42.56.240(1) no longer applies: “After September 4, 2013, however, as conceded by Defendant’s counsel, these reports were no longer subject to the ‘effective law enforcement’ exemption. A charging decision was made in the case - the prosecutor declined to file charges against any law enforcement personnel.” CP 216. Thus Defendant’s argument that RCW 42.56.240(1) “barred” Plaintiff’s request (RB at 13-16) is incorrect and beside the point.

3. Plaintiff’s work product challenge does not encompass documents Investigator Keith Barnes may have created.

Defendant clouds the clear scope of records at issue here by asserting that the “record . . . is undisputed [that] 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" RB at 23 (underlineation in original).

There is no confusion about the scope of Plaintiff's work product challenge—it encompasses only those documents created by third-party police agencies where the Prosecutor's Investigator (Keith Barnes) played no role, except to rotely move the reports or witness interviews from one place to another. *See* CP 131, 134-35, 199. As the trial court accurately found, "In this case, the prosecutors literally just requested all documents from all law enforcement agencies involved in the shooting, and then placed those documents into their files." CP 220. As before the trial court, Plaintiff does not seek production of documents that Mr. Barnes created or witness interviews he may have conducted.¹ For purposes of this appeal, the only records at stake are those created independent of Mr. Barnes.

B. Defendant Refuses to Follow the PRA's Liberal Policy In Favor of Disclosure and Canons of Construction to Narrowly Construe Exemptions.

PRA jurisprudence holds that agencies should construe requests broadly and exemptions narrowly in favor of a liberal policy of disclosure. *See Fisher Broadcasting*, Wn.2d 515, 522, 326 P.3d 688 (2014); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978).

¹ At deposition, Plaintiff directed questions to Mr. Barnes, specifically to create a clearer record of which interviews he may have conducted, which records (such as evidence inventories or photographs) he personally collected versus those he passively received as a matter of routine, or which reports he obtained through the intranet. *See* CP 129-131, 186. Each time, defense counsel instructed Mr. Barnes not to answer, on grounds of "work product." *Id.*

Defendant defies every applicable canon of construction and legislative mandate under the PRA in withholding the requested records here as “work product.” Defendant argues that it need not narrowly construe the work product exemption, because, it claims, “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.’” RB at 11 (quoting *Soter*, 162 Wn.2d at 740) (alteration by Defendant).

Soter stands for the proposition that the work product exemption “relies on the rules of pretrial discovery to define the parameters of the work product rule for purposes of applying the exemption.” 162 Wn.2d at 731. But that does not mean, as Defendant incorrectly claims, that statutorily mandated canons of construction do not apply. *Soter* itself makes this explicitly clear: “The [PRA] should be liberally construed and its exemptions should be narrowly construed in favor of disclosure.” *Id.* (citing RCW 42.56.030).

In addition to and consistent with these PRA standards, the law of evidence holds that privileges “are not lightly created nor expansively construed, for they are in derogation of the search for truth.” *Maxon*, 110 Wn.2d at 567, 569 (quoting *Nixon*, 418 U.S. at 710).

This Court’s plurality decision in *Limstrom* held that police reports created by the Pierce County Sheriff’s Office were “documents . . . part of the prosecutor’s fact-gathering process and are work product.” 136 Wn.2d

595 at 614. Yet Defendant reads *Limstrom* as expansively as possible to encompass such third-party documents created in the ordinary course of business. Indeed, under Defendant’s open-ended concept of the “fact-gathering process,” Defendant lays claim to facts already gathered by independent municipal police agencies—again in spite of all applicable standards to read the exemption and *Limstrom* narrowly. RCW 42.56.030; *Zakel*, 61 Wn.App. at 808 (plurality’s holding should be only that “taken by those concurring on the narrowest grounds”).

On its facts, *Limstrom* protected the Pierce County Prosecutor’s files that contained factual documents (including police reports) where “Deputy Eugene Allen, of the Pierce County Sheriff’s Department, was involved,” and “a statistical summary of 54 DUI arrests made by Deputy Allen.” 136 Wn.2d at 601. *Limstrom* is distinguishable because it did not present the pivotal issue of whether an agency may withhold reports and other documents routinely created by third-party municipal police agencies, in the ordinary course of police business, for a purpose independent of the Prosecutor. *Limstrom* did not even confront the issue of whether such documents fall outside of work product protection altogether, as subsequent Washington law holds. See *Morgan*, 166 Wn.2d at 754 (“The work product doctrine does not shield records created during the ordinary course of business.”).

1. *Limstrom* Is a Plurality Decision Not Binding on this Court.

Defendant does not and cannot refute the authority that a plurality decision “is not precedent,” and a “plurality’s reasoning [is] not binding . .

. under the doctrine of stare decisis” or “controlling for other cases.”
Harris v. Drake, 116 Wn.App. 261, 270 n.24, 65 P.3d 350 (2003); *see also*
State v. Gonzalez, 77 Wn.App. 479, 486, 891 P.2d 743 (1995) (plurality
opinions “have only limited precedential weight and are not binding”).

Defendant instead claims that in “almost two decades since
Limstrom, this Court and the Court of Appeals have repeatedly cited and
followed that decision.” RB at 19. Defendant cites a number of decisions
by this Court; yet even as described by Defendant, these cases do not
address the issue here. *See Resident Action Council v. Seattle Housing*
Auth., 177 Wn.2d 417, 431, 327 P.3d 600 (2013) (PRA exemptions
“protect relevant privacy rights or vital governmental interests that
sometimes outweigh the PRA’s broad policy in favor of disclosing public
records.”); *Ameriquist Mortg. Co. v. Office of Atty. Gen. of Washington*,
177 Wn.2d 467, 486, 300 P.3d 799 (2013) (discussing PRA exemptions
and privacy rights).

Defendant also lists a few cases from the Washington Court of
Appeals to argue that *Limstrom* is “controlling.” RB at 19-20. With a
single exception, the cases are not on point. *See, e.g., Washington State*
Dept. of Transp. v. Mendoza de Sugiyama, 182 Wn.App. 588, 330 P.3d
209 (2014) (discussing whether court-issued protective order functions as
PRA ground for withholding); *Kleven v. King Cnty. Prosecutor*, 112
Wn.App. 18, 24, 53 P.3d 516 (2002) (requested notes “non-discoverable
attorney work product and reflect [lawyer’s] mental impressions, legal
research, theories, opinions, and conclusions.”).

Defendant also cites *Koenig v. Pierce County*, 151 Wn.App. 221, 211 P.3d 423 (2009), to argue that it “expressly rejected arguments identical” to Plaintiffs’. RB at 21. In *Koenig*, the requester asked both the Pierce County Prosecutor and Sheriff’s Department for documents. 151 Wn. App. at 225. The prosecutor produced 188 pages, but withheld as work product “44 pages of police reports and 139 pages of transcripts of witness interviews conducted by the sheriff’s office and held by the prosecutor.” *Id.* at 226.

Defendant does not dispute that *Koenig* was silent about what selection process underlay the protection. See RB at 27. Defendant does not explain how in that case 188 pages from the Prosecutor’s file were produced, even though they presumably were part of the Prosecutor’s “fact-gathering process.” This undermines Defendant’s argument that its work product claim covers everything Plaintiff requested here. And in any event, this Court need not accept *Koenig*’s reasoning any more than it must follow the *Limstrom* plurality to which *Koenig* deferred. 151 Wn. App. at 231.

2. This Court’s Decision in *Soter* Supports Plaintiff’s Position.

Defendant also relies on *Soter* to bolster its argument under *Limstrom*. RB at 20. *Soter* considered the question whether interview notes created by a school district’s hired outside counsel and investigator, soon after a student’s death, were records created in the ordinary course of business or in anticipation of litigation, 162 Wn.2d at 731-33; and whether

interview notes by an attorney or by an investigator working at the attorney's direction were work product. *Id.* at 743-44.

In reaching its decision, the Court canvassed work product precedents dating back to *Hickman v. Taylor*, 329 U.S. 495 (1947), and subsequent federal cases, such as *Upjohn Co. v. United States*, 449 U.S. 383, (1981), concluding: "An attorney's notes regarding a witness's oral statements are permeated with his or her inferences, as well as clues as to the portions of a statement the attorney believed to be important." *Soter*, 162 Wn.2d at 742. The Court also considered *Limstrom*: "Given all of the above considerations, we decline to abandon the *Limstrom* analysis and instead we classify an attorney or legal team's notes regarding witness interviews as highly protected opinion work product." *Id.* at 743.

Yet the *Soter* decision did not consider fact-gathering performed by third-parties who operate independently of a lawyer's (or prosecutor's) office like the municipal police here.² Nor did this Court in *Soter*

² Defendant surely will claim that in this case its Investigator (Barnes) was doing fact-gathering at the direction of the Prosecutor. As discussed below, however, that is a central fallacy in Defendant's position. Here, Fife and Lakewood police officers led the officer-involved shooting investigation, conducted the interviews, drafted the reports, compiled the evidence, and then transferred *their* fact-gathering to the Prosecutor's Office. *See, e.g.*, CP 134-135, 163-164, 199-200.

If anything, *Soter* supports Plaintiff's position. Unlike Mr. Barnes' scant involvement, "[t]he vast majority of the records requested in [*Soter*] are handwritten notes created either by the school district's attorneys or by Prescott, the investigator hired by the attorneys in anticipation of litigation. These notes reflect the attorneys' and investigator's thoughts regarding client and witness interviews." *Soter*, 162 Wn.2d at 743. Here, no mental impressions are at stake.

consider whether *Limstrom*'s reasoning was "sound" with respect to a claim of ordinary work product where no mental impressions of the lawyer or investigator are stake. And contrary to Defendant's position, *Soter* did not invoke *Limstrom* as binding precedent, but rather acknowledged it was "a plurality opinion, with one justice concurring in result only." *Id.* at 741 n.10.

C. *Limstrom*'s "Fact-Gathering" Should Not Encompass Rote Transfer of All Police Reports and Other Materials That Were Independently Created and Already Complete Documentation of Municipal Police Fact-Gathering.

Defendant reads *Limstrom* expansively as possible to encompass third-party documents created in the ordinary course of business. In fact, Defendant's open-ended concept of "fact-gathering" lays claim to facts already gathered by independent municipal police agencies.³

Here, Lakewood investigators "prepared" reports "as part of their duties in reporting their official activities, pursuant to their training and experience guided by the policies of the Lakewood Police Department," including sixteen reports submitted via the South Sound 911 Records Management System (RMS). *See* CP 199-200. It is undisputed the Prosecutor's Office did nothing more than move these records in bulk from the RMS intranet site to its own file. *See* CP 134-35.

³ Defendant complains that Plaintiffs "misstate" the County's position by characterizing its work product theory that "all documents gathered into a prosecutor's file are work product." RB at 12. Yet that is precisely the Prosecutor's logic here. Because the third-party police reports and materials were transferred *en masse* from the hands of Fife police or via the RMS intranet into the prosecutor's file, Defendant argues *ipso facto* that these materials reflect the Prosecutor's fact-gathering process.

Other than the reports available through RMS, the trial court correctly found that “[a]ll other types of records and files which Lakewood officers or employees prepared . . . were delivered to the lead investigative agency, the City of Fife, which in turn provided them to the Prosecutor’s Office.” CP 200-01. In fact, Fife’s Det. Thomas Gow personally gave the Prosecutor “a complete copy of the Fife Police Department’s investigation file” in the week before August 28, 2013. CP 163-64. According to Det. Gow, this delivery included “reports written by City of Fife police officers . . . as part of the Fife Police Department’s normal course of business and consistent with our standard investigatory protocol.” CP 164.

Defendant claims Plaintiff has no evidence for the assertion “that documents sought out and obtained by [Barnes] were not gathered or collected ‘in any meaningful way,’ (RB at 26 n.3), and that Mr. Barnes “did not ‘sift through’ the reports here.” RB at 31. But at deposition, Mr. Barnes did not testify that he used some reports and discarded others when obtaining them from the participating police agencies:

Q: With respect to the documents that were uploaded by these various agencies onto the RMS system, . . . did you transfer all those documents into the prosecutor’s file?

A: Yes.

CP 134-135. The record is not more fully developed on this point because defense counsel objected to this question about Mr. Barnes’ method of transfer and instructed him not to answer. *See* CP 135. With respect to the Fife documents not available on RMS, Mr. Barnes confirmed these

documents were ones that *Fife officers* “*had collected*” and provided to the Prosecutor’s Office, in “two notebooks.” CP 131 (emphasis added).

Washington law holds records created in the ordinary course of business are not work product. *See Morgan, infra*. Defendant cannot skirt that principle, based on a sweeping reading of *Limstrom*, to argue that its Investigator may co-opt the fact-gathering of municipal police and lay claim to their already completed reports, simply because he moved these documents from one place to another. As the trial court rightly observed, “there is no question in this case that there was no gathering in any meaningful way.” RP, 17:11-12.

D. This Court Should Look to Federal Law and the Fundamental Work Product Principles In *Hickman* to Fashion a Rule That Protection of “Fact-Gathering” Must Entail Some Selection Process, the Disclosure of Which Reveals Mental Impressions.

In *Soter*, this Court discussed the paramount work product principle, per *Hickman* and other authority, that “stressed the danger that compelled disclosure of such memoranda [about an attorney’s witness interviews] would reveal the attorney’s mental processes.” 162 Wn.2d at 737 (internal quotation marks omitted).

Yet no such policy rationale supports Defendant’s expansion of *Limstrom* to capture records that are otherwise prepared in the ordinary course of police business, where the Prosecutor’s Office has not commented on or summarized those documents or otherwise revealed mental impressions. Indeed, Washington law, federal law, the purpose of the *Hickman* rule, and the practical realities of civil discovery all point to a

requirement, notwithstanding *Limstrom*, that a work product proponent must show that disclosure would reveal some mental process of the attorney or her agent by virtue of a selection process.

1. Washington law removes work product protection from records created during the ordinary course of business.

Defendant does not dispute that all the records at issue here—police reports, witness interviews, evidence inventories, warrant affidavits, audio and video recordings—were documents created during regular police business, independent of the Prosecutor’s Office, as representatives of Fife and Lakewood confirmed. *See* CP 164, CP 200.

Under Washington law, this status is sufficient for these records to fall outside of work product protection altogether: “*The work product doctrine does not shield records created during the ordinary course of business.*” *Morgan*, 166 Wn.2d at 754 (emphasis added); *see also In re Detention of Williams*, 147 Wn.2d 476, 494, 55 P.3d 597 (2002); *Heidebrink v. Moriwaki*, 104 Wn.2d 392,398-99, 706 P.2d 212 (1985) (“statements from non-party witnesses” in insurance investigation reports not work product); *State v. Brown*, 68 Wn.2d 852, 416 P.2d 344, 349 (1966).

Defendant’s only response is that these cases “did not concern work product principles” or addressed only “opinion” work product rather than “ordinary” work product. RB at 29. This position is wrong on its face because the aforementioned cases obviously do discuss work product. It is also beside the point, because, if work product protection does not

attach to any records “created during the ordinary course of business,” the distinction between “opinion” and “ordinary” work product is irrelevant.

2. *Hickman* and other federal cases are sound persuasive authority.

The only way to harmonize the *Morgan* principle that ordinary business records are categorically not work product and *Limstrom*’s protection for fact-gathering is to require the work product proponent to show that disclosure would reveal a protected selection process, *i.e.*, what *Hickman* calls “the lawyer’s ability to sift what he [or she] considers to be the relevant from the irrelevant facts.” 329 U.S. at 510. Defendant relies on *Hickman* to argue its position serves to prevent “unnecessary intrusion” so that the lawyer can “assemble information, . . . prepare his legal theories and plan his strategy without undue and needless interference.” RB at 23-24 (underlineation by Defendant) (quoting *Hickman*, 329 U.S. at 510-11). Yet Defendant does not explain how exactly this “undue interference” might occur, except by having to locate and provide otherwise public records like any other public agency must.

a. Police reports are discoverable under the rules of civil procedure.

Defendant appears to argue that this “undue interference” is simply having to provide a requestor (or opposing counsel) ordinary business records that *Morgan* deems not to be work product. Yet as argued in Plaintiffs’ Opening Brief and unrebutted here, parties routinely provide such documents under the rules of civil procedure, precisely because they are not work product. *See, e.g., Pacific Gas and Elec. Co. v. U.S.*, 69

Fed.Cl. 784, 796-97 (2006) (no work product as to police reports when made per “routine procedure”); *McCloskey v. White*, No. 09cv1273, 2011 WL 6371869, *3 (N.D. Ohio Dec. 20, 2011) (no protection because “police reports and surveillance video created during routine traffic stops and during other routine law enforcement activities”) (unpublished); *Joseph v. Las Vegas Metropolitan Police Dept.*, No. 09cv966, 2011 WL 846061, *3 (D. Nev. Mar. 08, 2011) (compelling production of “police reports provided to the district attorney’s office”) (unpublished); *cf. Heath v. F/V ZOLOTI*, 221 F.R.D. 545, 549 (W.D.Wash. 2004); *Miller v. Pancucci*, 141 F.R.D. 292, 303 (C.D.Cal.1992).

Defendant attempts to distinguish *Pancucci* because that case did not concern what “an attorney had collected as part of fact gathering for purposes of litigation.” RB at 34 n.6 But this argument suffers from the same misplaced distinction between “opinion” and “ordinary” work product. *Pancucci* compelled discovery of “memoranda, notes, writings, tape recordings, photographs, charts, diagrams, transcripts and physical evidence relating to [an] incident” of alleged use of excessive force. 141 F.R.D. at 303. Consistent with Washington law under *Morgan*, *Pancucci* concluded: “Citizen complaints are investigated by Internal Affairs regardless of whether litigation is anticipated. It is done in the regular course of business Documents prepared in the regular course of business *do not fall under ‘work product’* and thus are not immune from discovery.” 141 F.R.D. at 303 (emphasis added).

Under *Soter*, “the rules of pretrial discovery . . . define the parameters of the work product rule for purposes of applying the exemption,” 162 Wn.2d at 731, as Defendant notes. RB at 11. In fact, Defendant stresses, per *Soter*, 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.’” *Id.* Thus the converse is true: materials discoverable under the civil rules of pretrial discovery are not exempt from public disclosure.

The import of *Pancucci* and the other cited cases is that parties in a civil suit could not claim work product as to Fife and Lakewood police reports and other investigative materials; they would be provided to opposing counsel if requested. Under *Soter*, that requires production of these same documents pursuant to a PRA request. The location of these unprotected records cannot alter their status as “not work product,” unless some additional work is performed, such as adding attorney comments, producing a summary, or selecting a few documents from the many.

b. Federal law provides a sound framework for requiring a showing of some selection process in order to warrant work product protection.

Defendant claims, in light of Federal Rule of Civil Procedure 26(b)(3) that distinguishes between “ordinary” and “opinion” work product, that Plaintiffs “misuse . . . *Hickman*” in advocating for a rule that requires some attention to the revelation of mental impressions. RB at 24-25. Again, this distinction does not change the fact that no work product

protection can attach at all because “[d]ocuments prepared in the regular course of business do not fall under ‘work product.’” *Pancucci*, 141 F.R.D. at 303; *see also Morgan, supra*.

Defendant admits, moreover, that a host of federal cases cited by Plaintiffs (*see* AB 30-32) hold that some selection process must be present to allow for protection, even after the advent of Federal Rule of Civil Procedure 26(b)(3). RB 30-32. Defendant does not address the policy merits of these decisions. Instead, Defendant claims these cases are “contrary to each other,” and that “[i]t 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.’” RB at 32 (quoting *Limstrom*, 136 Wn.2d at 611) (emphasis by Defendant).

But *Limstrom* did not actually cite any Washington “decisions” that supported this “bright line rule.” As discussed in Plaintiff’s Opening Brief, *Limstrom* deferred to the analysis of Professor Lewis H. Orland, and his *Observations on Work Product Rule*, 29 Gonz. L. Rev. 281 (1993-94). *See* AB at 18-19, 26. *Limstrom* did cite *Heidebrink v. Moriwaki*, 104 Wn.2d 392, for the principle that “[m]ental impressions of the attorney and other representatives embedded in factual statements should be redacted.” 136 Wn.2d at 612. However, *Limstrom* cited no Washington authority for the principle that an actual selection process should have no

bearing on the core of the “ordinary work product” rule. *Id.* *Limstrom* relied only on Professor Orland. *Id.*

Whatever “conflicting” aspects there may be among the federal cases cited by Plaintiff, the salient point is that a proponent of work production protection must be able to show that divulging the records would reveal some selection process. *See, e.g., Shapiro v. U.S. Dept. of Justice*, 969 F.Supp.2d 18, 32 (D.D.C. 2013) (“A crucial factor” in work product doctrine is whether “attorney’s selection of the contents could reveal or provide insights into the mental processes”); *compare* with *Am. Mgmt. Ser., LLC v. Dept. of the Army*, 842 F.Supp.2d 859, 881-82 (E.D. Va. 2012) (“invoices, emails, and internal reports” exchanged between the Army and an outside corporate counsel “are confidential work product because, as a result of their selection and inclusion in the binder, they reflect what . . . outside counsel believed most relevant”); *see also, e.g., In re Grand Jury Subpoenas, March 19, 2002 and August 2, 2002*, 318 F.3d 379, 383, 386 (2d Cir. 2003) (“Not every selection and compilation of third-party documents by counsel transforms that material into attorney work product.”); *Willingham v. Ashcroft*, 228 F.R.D. 1, 7 (D.D.C. 2005) (no work product protection because no “selection and reliance upon a few documents, from a sea of thousands of documents produced in discovery”).

Shapiro and *American Management Services* were cases that arose under the federal Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Washington courts often look to FOIA for guidance when interpreting the

PRA. See *Mendoza de Sugiyama*, 182 Wn.App. at 601 (Because “PRA is modeled after” FOIA, “we often look to judicial constructions of the FOIA in construing our own statute.”).

Defendant disputes the import of FOIA because, it claims, FOIA “differs in many ways’ from the PRA.” RB at 33 (quoting *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 731, 748 P.2d 597(1988)). Though this difference may be material in other contexts, the scope of attorney-client privilege and work product under PRA and FOIA are deemed aligned:

The United States Supreme Court has concluded that “Congress had the attorney’s work-product privilege specifically in mind when it adopted Exemption 5.” *Nat’l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975). There, the Supreme Court explained that because virtually any document not privileged may be discovered by the appropriate litigant if it is relevant to his litigation, it is reasonable to construe Exemption 5 to exempt only those documents normally privileged in the civil discovery context (*including* attorney-client and attorney work-product privileges generally available to all litigants).

Accordingly, we construe the controversy exemption of the PRA to exempt documents and records like those under the nearly absolute protection of the work product doctrine and those privileged by the existence of an attorney-client relationship. *Soter*, 162 Wash.2d at 733, 745, 174 P.3d 60. This reading is consistent with the spirit and purpose of the PRA as a “‘strongly worded mandate for broad disclosure of public records.’” *Soter*, 162 Wash.2d at 731. . . (quoting *Hearst Corp.*, 90 Wash.2d at 127 . . .).

Mendoza de Sugiyama, 182 Wn.App. at 602 (emphasis added). Thus this Court may look to FOIA case law and the principle that the selection process is material to the work product analysis.

E. Even If Work Product Applied, Plaintiffs Had A Substantial Need For the Requested Records and Could Not Obtain The Same Information Elsewhere.

In the event a court designates withheld material as legitimate “work product” under CR 26(b)(4), a party may still “obtain discovery of documents and tangible things otherwise discoverable . . . only upon a showing that the party seeking discovery has substantial need of the materials . . . and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”

Defendant scoffs at Plaintiffs’ claim of “substantial need” that the requesters, Annalesa and Fred Thomas, “‘were trying to learn why the police had killed their son’ and ‘wanted to test the officer’s account of what happened.’” RB at 37-38. As to the “inability to obtain elsewhere” prong, Defendant mistakenly asserts that “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.”⁴ RB at 38 (emphasis in original).

⁴ For this claim, Defendant relies on Plaintiffs’ response to an interrogatory, asking to “[l]ist all law enforcement and/or governmental agencies from which you have obtained *police reports or other documentation* in connection with the incident involving Leonard Thomas of May 24, 2013, and the dates each was received.” CP 152 (emphasis added). In response, Plaintiffs listed those agencies and the date on which they received any information (even if only an agency’s PRA response letter or request denial under RCW 42.56.240(1)). But these listed response dates do not mean that Plaintiffs received substantive reports—of course, they could not have because the police agencies withheld documents on grounds of the law enforcement exemption. Critically, moreover, Fife and Lakewood, which led the investigation and

Defendant urges the categorical claim that “want[ing] to be sure nothing has been overlooked” is insufficient to meet the substantial need test. *See* RB at 38 (quoting *Heidebrink*, 104 Wn.2d at 401-02). Yet *Heidebrink* did not adopt a categorical rule; rather, this Court held “we are unable to see any error in the trial court’s determination” and “*in the instant case* respondents have failed to show a substantial need for the statement.” 104 Wn.2d at 402 (emphasis added). Also, *Heidebrink* was not a PRA case, and Defendant’s reliance on that case is in tension with PRA jurisprudence that expressly does not excuse an agency response because the requested records may be available elsewhere. *See Iloppe*, 90 Wn.2d at 132 (“fact that the material may be available in other records is not a reason stated in the act for failure to disclose”); Wash. Admin. Code 44-14-04004 (“When more than one agency holds a record, and a requestor makes a request to the first agency, the first agency cannot respond to the request by telling the requestor to obtain the record from the second agency.”).

Far more important, the Prosecutor’s position ignores the factual backdrop of this request: that it obviously was aimed at learning why

gathered the vast share of reports, witness interviews, audio and video recordings, did not respond with any documents until well after the Prosecutor’s charging decision on September 4, 2013. *See* CP 152 (Fife’s responses on “11/12/2013” and “12/5/2013”) (Lakewood responses on “10/17/2013, 11/04/2013, 11/18/2013, 12/12/2013”). And as represented to the trial court during the summary judgment hearing, Plaintiff still had not received complete PRA responses. RP, 25:15-26:3.

Leonard Thomas was killed, what was the factual basis for the Prosecutor's charging decision, and whether there were gaps in the information the Prosecutor had when making his decision. *See* RP 26:4-27:12.

In this case context should matter. Absent an inquest procedure, where evidence about the justifications for officer-involved shootings are publicly aired, Fred and Annalesa Thomas had and still have no way of knowing on what factual basis the Pierce County Prosecuting Attorney's Office decided—*in secret*—that Officer Brian Markert's killing of their son was justified. The need here was thus inherently substantial, and indeed compelling.

The fundamental tenet of the PRA is: "The people of this state do not yield their sovereignty to the agencies that serve them." RCW 42.56.030. The Pierce County Prosecuting Attorney's Office serves the people like any other state agency. And in this case it had considerable power over people's lives—to decide whether a state actor, authorized to use deadly force, killed Leonard Thomas within the bounds of the law. Where Pierce County chooses to make that decision in secret, the PRA is essential to ensure transparency and accountability, by at least allowing access to the factual documents the Prosecutor used in making its decision.

Pierce County turns this PRA core principle on its head. In claiming that these ordinary police records are "work product" that Plaintiffs cannot see even on the "substantial need" basis, Pierce County takes the shocking position that the people must yield to *it* and never be

able to look at otherwise public documents from which it decided the killing was justified.

DATED this 10th day of April, 2015.

Respectfully submitted,

MacDONALD, HOAGUE & BAYLESS

By 

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Attorneys for Appellants

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 10, 2015, I arranged for filing the original of the foregoing Appellants' Reply Brief with the Supreme Court of the State of Washington; and arranged for service of a copy of the same on the parties to this action as follows:

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DATED this 10th day of April, 2015, at Seattle, Washington.

s/Terri Flink
Terri Flink, Legal Assistant

OFFICE RECEPTIONIST, CLERK

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Attached for filing into Case No. 90195-3 – Thomas v. Pierce County, WA Prosecuting Attorney's Office is Reply Brief of Appellant, which is being submitted by Appellants' attorney, David Whedbee, WSBA # 35977. Mr. Whedbee's contact information is: MacDonald Hoague & Bayless, 705 2nd Avenue, Suite 1500, Seattle, WA 98104; 206-622-1604; davidw@mhb.com.

As indicated in the Certificate of Service attached to the motion, Respondent's counsel of record, Daniel Hamilton, is being served a paper copy of the document via U.S. Mail.

Thank you,

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