

Table of Contents

	<u>Page</u>
I. INTRODUCTION.....	1
II. STATEMENT OF THE ISSUES.....	1
III. STATEMENT OF THE CASE.....	3
IV. ANALYSIS	10
<u>1. Under The Public Records Act The Disclosed But Withheld Attorney Work Product Was Exempt From Production And Release Under Well-Established Law.....</u>	10
A) Documents Gathered By And Used In Preparation For And During Litigation By The Prosecuting Attorney’s Office Are Exempt From Production And Release Pursuant To The Work Product Doctrine, CR 26 And RCW 42.56.290	11
B) The Plaintiff Could Obtain The Requested Records From Other Sources	20
C) The Prosecutor’s Office Was Not Required To Produce And Maintain A Separate Exemption Log Because It Properly Identified The Withheld Records	22
D) The Work Product Exemption Continues To Exist Even After The Underlying Litigation Has Ended	25
<u>2. The Case Must Be Dismissed For Insufficiency Of Service Of Process Because Mr. Day Never Served Pierce County</u>	27

A.	Because Pierce County Was Never Served, The Case Must Be Dismissed For Insufficiency Of Service Of Process	27
B.	The Doctrine Of Equitable Estoppel Does Not Apply Here To Overcome Insufficiency Of Service Of Process	29
	<u>3. Requests For Discovery, Discovery Sanctions, and In Camera Review Were Properly Denied</u>	32
A.	In Public Records Cases Discovery and Discovery Sanctions Cannot Be Used To Thwart The Attorney Work Product Exemption	32
B.	In Camera Review Was Properly Denied Because The Trial Court Could Determine From The Face Of Pleadings And Supportive Declarations That Withheld Documents Were Attorney Work Product	37
	<u>4. Miscellaneous Issues on Appeal</u>	39
A.	Failure To File Certificate Of Service And Note Of Issue With The Court Precluded The Court From Setting CR 12(B) And CR 55 Motions	39
B.	Orders Granting Summary Judgment Must Meet The Requirements Of CR 56 And Not CR 54	40
III.	CONCLUSION	41

Table of Authorities

	<u>Page</u>
Cases	
<i>Bonamy v. City of Seattle</i> , 92 Wn. App. 403, 960 P.2d 447 (1998)	33
<i>Bradford v. City of Seattle</i> , 557 F.Supp.2d 1189 (W.D. Wash. 2008).....	28
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).....	34
<i>Daines v. Spokane County</i> , 111 Wn. App. 342, 44 P.3d 909 (2002).....	13
<i>Davidheiser v. Pierce County</i> , 92 Wn. App. 146, 960 P.2d 998 (1998), <i>rev. denied</i> 137 Wn.2d 1016, 978 P.2d 1097 (1999)	29, 30, 31
<i>Dawson v. Daly</i> , 120 Wn.2d 782, 845 P.2d 995 (1993)	13, 14, 25, 26
<i>Dever v. Fowler</i> , 63 Wn. App. 35, 816 P.2d 1237 (1991).....	13
<i>Guillen v. Pierce County</i> , 144 Wn.2d 696, 31 P.3d 628 (2001), <i>rev'd on other grounds</i> , <i>Pierce County v. Guillen</i> , 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003).....	12
<i>Harris v. Drake</i> , 152 Wn.2d 480, 99 P.3d 872 (2004)	25, 26
<i>Harris v. Pierce County</i> , 84 Wn. App. 222, 928 P.2d 111 (1996).....	38
<i>Hearst Corporation v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978).....	34
<i>Hickman v. Taylor</i> , 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).....	26
<i>Koenig v. Pierce County</i> , 151 Wn. App. 221, 211 P.3d 423 (2009).. <i>passim</i>	
<i>Landreville v. Shoreline Comm. College Dist. No. 7</i> , 53 Wn. App. 330, 766 P.2d 1107 (1988).....	29
<i>Las v. Yellow Front Stores, Inc.</i> , 66 Wn. App. 196, 831 P.2d 744 (1992)	34
<i>Limstrom v. Ladenburg</i> , 136 Wn.2d 595, 963 P.2d 869 (1998)	<i>passim</i>

<i>Meadowdale Neighborhood Comm. v. City of Edmonds</i> , 27 Wn. App. 261, 616 P.2d 1257 (1980).....	29
<i>Neighborhood Alliance v. County of Spokane</i> , 153 Wn. App. 241, 224 P.3d 775 (2009).....	33, 34, 35
<i>Nitardy v. Snohomish County</i> , 105 Wn.2d 133, 712 P.2d 296 (1986).....	29
<i>Nolan v. Snohomish County</i> , 59 Wn. App. 876, 802 P.2d 792 (1990).....	27, 28
<i>Pappas v. Holloway</i> , 114 Wn.2d 198, 787 P.2d 30 (1990).....	25, 26
<i>Progressive Animal Welfare Society v. University of Washington (PAWS)</i> , 125 Wn.2d 243, 884 P.2d 592 (1994).....	22, 23
<i>Public Citizen Health Research Group v. Food & Drug Admin.</i> , 997 F. Supp 56 (D.D.C.1998), <i>aff'd in part, rev'd on other grounds</i> , 185 F.3d 898 (D.C.Cir.1999).....	35
<i>Rugiero v. U.S. Dep't of Justice</i> , 257 F.3d 534 (6th Cir. 2001).....	34
<i>Sanders v. State</i> , 169 Wn.2d 827, 240 P.3d 120 (2010).....	19, 23, 24
<i>Schiller v. Immigration & Naturalization Service</i> , 205 F.Supp.2d 648 (W.D.Tex. 2002).....	34, 35
<i>Smith v. Okanogan County</i> , 100 Wn. App. 7, 994 P.2d 857 (2000).....	33, 34
<i>Soter v. Cowles Publishing Co.</i> , 162 Wn.2d 716, 174 P.3d 60 (2007).....	passim
<i>Sperr v. City of Spokane</i> , 123 Wn. App. 132, 93 P.3d 1012 (2004).....	35
<i>Spokane Research & Defense Fund v. Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005).....	35
<i>Texas v. Brown</i> , 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983).....	15
<i>Tinder v. Nordstrom</i> , 84 Wn. App. 787, 929 P.2d 1209 (1997).....	34
<i>West v. Thurston County</i> , 144 Wn. App. 573, 183 P.3d 346 (2008).....	16
<i>Yakima Newspapers, Inc. c. City of Yakima</i> , 77 Wn. App. 319, 890 P.2d	

544 (1995).....	38
<i>Young v. Key Pharmaceuticals</i> , 112 Wn.2d 216, 770 P.2d 182 (1989)....	34

Statutes

Chapter 42.17 RCW.....	12
Chapter 42.56 RCW.....	12
CR 26(f).....	36, 37
CR 26(i).....	36, 37
CR 56(f).....	36
RCW 36.01.010.....	28
RCW 36.01.020.....	28
RCW 36.32.120(6).....	28
RCW 4.28.080(1).....	28, 31, 32
RCW 42.17.310(1)(j).....	12, 14
RCW 42.17.310(4).....	22
RCW 42.56.070.....	33
RCW 42.56.210(3).....	22
RCW 42.56.290.....	passim
RCW 42.56.520.....	33
RCW 42.56.550(1).....	12
RCW 42.56.550(3).....	13
RCW 42.56.550(6).....	32

Other Authorities

2007 Final Legislative Report, 60th Wash. Leg. 16
Pierce County Charter Section 5.90..... 28

Rules

CR 12(b)..... 39
CR 26 passim
CR 26(b)(1)..... 19
CR 26(b)(4)..... passim
CR 4(g)..... 39, 40
CR 54 40
CR 55 39
CR 56 40
CR 56(h)..... 40
CrR 4.7..... 7, 14
CrR 4.7(f)(1) 14
Pierce County Superior Court Local Rule PCLR 3(c)..... 39, 40

I. INTRODUCTION

This is a straightforward case. Appellant requested a copy of a county prosecutor's criminal prosecution case file under the public records act. The prosecutor's office responded by disclosing the contents of the prosecution case file, producing the non-exempt documents, withholding exempt confidential attorney work product documents, and informing the appellant of the number and types of documents withheld and the reason why each document was withheld. Appellant objected to any withholding and sought relief against the prosecutor's office in superior court.

The appellant sought to obtain the withheld confidential attorney work product documents through discovery. The county objected to the discovery request and moved for summary judgment on the alternate grounds that the confidential attorney work product documents were exempt from production and release under well-established law, or that the case should be dismissed for insufficiency of service of process because the appellant never served the county. The trial court granted the county's motion for summary judgment. This appeal followed.

II. STATEMENT OF THE ISSUES

1. Under the public records act, are documents gathered by and used in preparation for and during litigation by the prosecuting attorney's office exempt from production and release pursuant to the work product

doctrine, CR 26 and RCW 42.56.290, and/or where such documents could be obtained from other sources?

2. Under the public records act, was the prosecutor's office required to produce and maintain a separate exemption log when the withheld documents were properly identified to the requestor?

3. Under the public records act, does the work product exemption for documents gathered by and used in preparation for and during litigation by the prosecuting attorney's office remain even after the underlying litigation has ended?

4. By failing to serve the county auditor, should the case against the county prosecuting attorney's office be dismissed for insufficiency of service of process?

5. Can equitable estoppel be used to overcome insufficiency of service of process when plaintiff is made aware of the defense of improper service before the statute of limitation to bring the public records action runs?

6. Under litigation brought under the public records act, can pre-trial discovery be used to obtain documents exempt from production and release pursuant to the work product doctrine?

7. Under litigation brought under the public records act, is in camera review of the withheld documents required whenever it is requested

even though the court could determine from face of pleadings and supportive affidavits that documents were attorney work product?

III. STATEMENT OF THE CASE

On August 3, 2009, the Plaintiff/Appellant in this case, Larry A. Day, an inmate at the Stafford Creek Corrections Center, sent a two-page letter addressed to "Bertha B. Fitzer¹, Prosecuting Attorney." CP 139-140.

Mr. Day requested the following records (CP 145):

1. Pierce County Sheriff's Forensic Team Loree Barnett reports of the investigation of the Search and Seizure of the subject property
2. Copy of the test run on all weapons
3. Copy of the test run on all fingerprints
4. Copy of the test run on all DNA
5. Copy of the affidavit of Sean Syndar
6. Copy of the affidavit of Melissa Cleary
7. Copy of the affidavit of Scott Cleary
8. Copy of the affidavit of Tiffany White
9. Copy of the affidavit of John White
10. Copy of the affidavit of Elizabeth Johnson-Day
11. Copy of the affidavit of Gary Montgomery
12. Copy of the expert examiner's documents of the questionnaire taken in the County Jail
13. Transcript of Tape #71
14. Transcript of Tapes #1, 1, and 3
- 15-48. Exhibit Photos #15-18; 21-25; 27-38; 40-43; 44-45; 46-51; and 55
49. Documents of transcripts taken during restitution hearing

On August 5, 2009, the Pierce County Prosecuting Attorney's Of-

office received Mr. Day's August 3, 2009, public records request. CP 143.

On August 12, 2009 (within five business days of receipt of Mr. Day's letter), DPA Robert P. Dick sent a response letter to Mr. Day on behalf of DPA Ed Murphy, then the Office's Public Records Officer. CP 143. The letter indicated that it would take approximately two weeks to process the Plaintiff's public records request. CP 143. Mr. Day's request was assigned a reference number: PA 88/91 – 1289². CP 143.

On August 26, 2009, as promised, DPA Ed Murphy sent Mr. Day a detailed three-page letter. CP 145-147. DPA Murphy disclosed that there were 144 pages of documents and 3 compact discs (CDs) contained in the Prosecutor's files responsive to Mr. Day's request but that all the documents were protected work product, exempt from public disclosure under RCW 42.56.290, the work product doctrine, and CR 26. CP 145-147.

However, DPA Murphy went on to state that, because many of the records, including documents contained on compact disks, had been admitted as evidence in Mr. Day's criminal trial, DPA Murphy would waive the work product exemption and produce and release those specific docu-

¹ Bertha Fitzer was the Deputy Prosecuting Attorney [DPA] who prosecuted Mr. Day's criminal case, the basic subject matter of Mr. Day's public records request. CP 130-132.

² The Reference Number was mistakenly cited as "88/91" instead of the correct "88/09" where the number preceding the forward slash referenced the sequential number of public records requests received that year and the number after the slash stood for the last two digits of the year the request was made. However, the mistake was consistent throughout.

ments to Mr. Day. CP 145-147. A detailed description of the waived work product that was to be produced and released was contained in the letter. CP 145-147. DPA Murphy indicated that he would produce and release sixty-five (65) of the disclosed 144 pages and 3 CDs contained in Mr. Day's criminal file upon receipt from Mr. Day of the costs of copying and postage for mailing them to Mr. Day for which DPA Murphy provided the exact cost information. CP 145-147.

However, DPA Murphy also specifically stated that he would not waive the work product exemption and would not produce nor release seventy-nine (79) pages of investigative reports that contained "law enforcement investigative reports and statements... which were gathered for purposes of litigation³ and were not introduced at trial," thus, denying Mr. Day's request as to those disclosed but not produced nor released work product documents. CP 145-147.⁴

³ See Declaration of Bertha Fitzer. CP 130-132.

⁴ Details of the public records request and its response CP 145-147:

The Prosecuting Attorney's Office provided Mr. Day sixty-five (65) pages of materials and three (3) compact disks (CDs) in response to thirty-seven (37) of his requests, numbered 5, 13, 14, and 15 through 48, as well as a portion of his request number 6. Though the Prosecuting Attorney's Office had established that those 65 pages and 3 CDs of disclosed documents were exempt from production and release as confidential attorney work product, the Prosecuting Attorney's Office decided to waive the exemption and produce and release them to Mr. Day because the originals or other copies of those documents had been filed with the court during various proceedings and had become public records. Mr. Day's request number 6 was for the "affidavit of Melissa Cleary", and was granted in part and denied in part. One statement from Ms. Cleary had been filed with the court, and that was provided to plaintiff. However, there were other state-

After Mr. Day submitted a money order for the costs of copying and postage for mailing of the sixty-five (65) pages of disclosed, exemption-waived documents and 3 CDs, on September 10, 2009, Joyce Glass of the Prosecutor's Office sent a letter to Mr. Day enclosing the exemption-waived documents and CDs. CP 149-150 & CP 167-171.

On September 22, 2009, Mr. Day sent a letter to Melody M. Crick and "Public Disclosure Officer" at the Pierce County Prosecuting Attorney's Office objecting to any denial of any portion of his public records request, specifically demanding the release of the seventy-nine (79) pages withheld. CP 152-154.

On September 25, 2009, DPA Murphy responded to Mr. Day's September 22, 2009, objection letter concluding that his original determination of exemption was correct and repeating verbatim from his August

ments of Ms. Cleary that were not filed with the court, but had been gathered by the Prosecutor's Office for purposes of litigation, and were not released to Mr. Day. Five of Mr. Day's requests were denied in full. They were: Request No. 1) Pierce County Sheriff's Forensic Team Loree Barnett reports of the investigation of the Search and Seizure of the subject property; Request No. 3) Copy of the test run on all fingerprints; Request No. 7) Copy of the affidavit of Scott Cleary; Request No. 10) Copy of the Affidavit of Elizabeth Johnson-Daly; and Request No. 11) Copy of the Affidavit of Gary Montgomery. Mr. Day was advised in the August 26, 2009, letter that seventy-nine (79) pages of police reports responsive to his request, consisting of law enforcement investigation reports and statements, would not be provided to him in response to his requests numbered 1, 3, 7, 10, 11, and part of 6. Mr. Day was also advised that these records were gathered by the Prosecutor's Office for purposes of litigation and were not introduced at trial, and that the materials are exempt pursuant to the work product doctrine, RCW 42.56.290 and CR 26(b)(4).

In addition, Mr. Day was advised that no records were located in response to six (6) of his requests. They were requests numbered 2, 4, 8, 9, 12, and 49.

26, 2009, original letter, the explanation for his denial:

INVESTIGATIVE REPORTS. Responsive to your requests numbered 1, 3, 6, 7, 10, and 11. There are seventy-nine (79) pages of police reports (66-144). This documentation consists of law enforcement investigation reports and statements. These requested records of the Prosecutor's Office were gathered for purposes of litigation and were not introduced at trial. Under the Public Records Act those materials are exempt pursuant to the work product doctrine, RCW 42.56.290 and CR 26(b)(4) These requests are respectfully denied.

CP 156-157 (emphasis in the original).

Moreover, DPA Murphy went on to explain that all of the records that Mr. Day was now demanding had been provided to Mr. Day's criminal defense attorney pursuant to CrR 4.7 (which had prohibited the prosecutor from directly disclosing those criminal records to Mr. Day); and that Mr. Day could obtain the police reports directly from the investigating agency, the Bonney Lake Police Department (DPA Murphy even provided Mr. Day the incident number from the Bonney Lake police records); and that the reason for the denial based upon attorney work product was well supported by law, specifically citing to *Limstrom v. Ladenburg*, 136 Wn.2d 595, 611, 963 P.2d 869 (1998). CP 156-157.

On November 23, 2009, the Criminal Division of the Pierce County Prosecuting Attorney's Office received a copy of a "Verified Petition-Complaint for Public Records Act Violations" without cause number.

On December 15, 2009, a "Verified Petition-Complaint for Public

Records Act Violations” (“Complaint”), indicating the defendant as “Pierce County Prosecuting Attorney’s Office⁵,” was filed in Pierce County Superior Court showing the signature of Mr. Day but with an altered date of November 23, 2009 (alteration initialed by “EB”). CP 4-6.

Though never filed separately with the court, a “Certificate of Service,” signed by Eugene Bremner, stating that he personally served Mark Lindquist at the Pierce County Prosecuting Attorney’s Office on October 23, 2009, was submitted as an exhibit in Mr. Day’s declaration in support of his motion for a default judgment against the Pierce County Prosecuting Attorney’s Office. CP 26.

Much later, on April 12, 2011, a “Declaration of Eugene Bremner” was filed with the court stating Eugene Bremner served Mark Lindquist and specifically stating that he did not serve the Auditor’s Office. CP 111-112.⁶ This was corroborated by the Pierce County Auditor’s Office. CP 133-134. Therefore, it is undisputed by Mr. Day that the Pierce County Auditor’s Office was never served with a copy of his summons and Complaint.

On January 4, 2010, Mr. Day filed a motion for default against the

⁵ The defendant was listed as the Pierce County Prosecuting Attorney’s Office and not the Pierce County Prosecuting Attorney.

⁶ This document reflects that same “EB” initials for alterations that are found on the alterations found on the filed Complaint (CP 4-6), discussed, *supra*.

Prosecuting Attorney's Office (CP 31-44) with his supporting declaration (CP 7-30) that included, as an exhibit, a Note of Issue (to set a default hearing date) but that was never filed separately with the court (CP 27).

Even though no certificate of service of original service of process was properly filed with the court and even though no note of issue to set a default hearing date was properly filed with the court, Mr. Day attempted to confirm the hearing date directly with the Court. CP 46-48. The Court declined to set the hearing date and indicated to Mr. Day that his request was a prohibited ex-parte communication with the Court. CP 45. Mr. Day objected strongly to the Court directly. CP 49-55.

Having been made aware of this litigation, Pierce County filed a Notice of Appearance specifically reserving its right to object to both insufficiency of process and insufficiency of service of process. CP 125-126.

On February 4, 2010, Mr. Day served a discovery request upon the attorney for Pierce County, in effect requesting through discovery all of the documents withheld from his public records request. CP 76-85.

On March 3, 2010, Pierce County filed with the court its objection to Mr. Day's discovery request and moved for summary judgment on the alternative grounds that the confidential attorney work product documents were exempt from production under well-established law, or that case should be dismissed for insufficiency of service of process because Mr.

Day never served Pierce County. CP 56-87. Mr. Day filed a response which included a request for in-camera review of the withheld documents, request for discovery, and discovery sanctions against Pierce County. CP 88-107. Pierce County replied. CP 158-166. The trial court granted Pierce County's motion for summary judgment. CP 117-119. This appeal followed. CP 120-122.

IV. ANALYSIS

1. Under The Public Records Act The Disclosed But Withheld Attorney Work Product Was Exempt From Production And Release Under Well-Established Law

Mr. Day's public disclosure request, while difficult to read, was not complicated. Mr. Day requested forty-nine (49) specific items. The Prosecuting Attorney's Office's response to Mr. Day was, likewise, not complicated. The Prosecuting Attorney's Office disclosed that it held 144 pages of materials and three (3) compact disks (CDs) that were responsive to Mr. Day's request. The Prosecuting Attorney's Office produced and released to Mr. Day sixty-five (65) pages of materials and three (3) compact disks (CDs) even though the Prosecuting Attorney's Office had established that those 65 pages and 3 CDs of disclosed documents were exempt from production and release as confidential attorney work product. The Prosecuting Attorney's Office told Mr. Day that it had decided to waive the attorney work product exemption as to those documents and

produce and release them to Mr. Day because the originals or other copies of those documents had been filed with the court during various proceedings and had become public records. However, the Prosecuting Attorney's Office told Mr. Day that it would not waive the work product exemption for seventy-nine (79) pages of the disclosed documents because those records were gathered by the Prosecutor's Office for purposes of litigation, were not introduced at trial, and were exempt from production and release to Mr. Day pursuant to the work product doctrine, RCW 42.56.290 and CR 26(b)(4).

This case is fairly simple to analyze because the items requested by Mr. Day were clear and specific, and because the response by the Prosecuting Attorney's Office was also clear and specific. Because undisputed facts and binding precedent confirm only privileged Prosecutor work product was withheld, Mr. Day did not meet his burden of demonstrating that any genuine issue of material fact existed to prevent dismissal of his complaint.

- A) Documents Gathered By And Used In Preparation For And During Litigation By The Prosecuting Attorney's Office Are Exempt From Production And Release Pursuant To The Work Product Doctrine, CR 26 And RCW 42.56.290

The records contained in Pierce County Prosecuting Attorney's Office files were collected and prepared for the criminal prosecution of Mr.

Day⁷. They are exempt from public disclosure pursuant to RCW 42.56.290, CR 26, and the work product doctrine. Agencies bear the burden of establishing that a particular public disclosure exemption applies. RCW 42.56.550(1).

RCW 42.56.290 (formerly RCW 42.17.310(1)(j))⁸ exempts from public disclosure “[r]ecords 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.” The Washington State Supreme Court has held: “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, 174 P.3d 60 (2007) (citing *Guillen v. Pierce County*, 144 Wn.2d 696, 713, 31 P.3d 628 (2001), *rev'd on other grounds*, *Pierce County v. Guillen*, 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003)); *Limstrom*, 136 Wn.2d at 605.

Under the rules of pretrial discovery it is well established that documents "prepared in anticipation of litigation ... by or for another party

⁷ CP 130-132.

⁸ Prior to being re-codified and renamed the Public Records Act (Chapter 42.56 RCW), the public records statutes were contained within the Public Disclosure Act (PDA), codified as part of Chapter 42.17 RCW.

or by or for that other party's representative (including his attorney)" are not discoverable. CR 26(b)(4); *Dever v. Fowler*, 63 Wn. App. 35, 47, 816 P.2d 1237 (1991) (prosecutor's files protected from civil discovery). Washington's courts therefore hold the exemption of RCW 42.56.290 "incorporates the work product doctrine" and "is triggered prior to the official initiation of litigation" where litigation is "reasonably anticipated." *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993). See also *Soter*, 162 Wn.2d at 734 (because records prepared by attorney's investigators "are protected under CR 26's work product protection or its incorporation of attorney-client privilege, then the documents are not subject to public disclosure.")

In July 2009 Division I of the Court of Appeals thoroughly reviewed a public records request very similar to Mr. Day's for criminal records maintained by the Pierce County Prosecuting Attorney's Office. In *Koenig v. Pierce County*, 151 Wn. App. 221, 211 P.3d 423 (2009), the Court reviewed letters sent by the Prosecutor's Public Records Officer that were virtually identical to those sent to Mr. Day in this case. In doing so, the *Koenig* court closely examined the work product exemption to the Public Records Act. The Court of Appeals noted:

Judicial review of challenged agency actions under the Public Records Act is de novo. RCW 42.56.550(3); *Daines v. Spokane County*, 111 Wash. App. 342, 346, 44 P.3d 909 (2002).

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” from public disclosure. RCW 42.56.290 (formerly RCW 42.17.310(1)(j)). This “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. *Dawson v. Daly*, 120 Wash.2d 782, 789-90, 845 P.2d 995 (1993).

Washington has two discovery rules: CR 26 and CrR 4.7. Each rule differently defines the scope of work product. *Limstrom* was a case of first impression that addressed which discovery rule applies to the exemption under RCW 42.56.290.

In *Limstrom*, the lead opinion of four justices held that “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.” *Limstrom*, 136 Wash.2d at 609, 963 P.2d 869. The lead opinion interpreted the civil rule, CR 26(b)(4), as including within the definition of work product “formal or written statements of fact, or other tangible facts, gathered by an attorney in preparation for or in anticipation of litigation.” *Limstrom*, 136 Wash.2d at 611, 963 P.2d 869. Such work product as defined under the civil rule is protected from disclosure unless the requester is able to demonstrate a substantial need and an inability to obtain the documents from other sources. CR 26(b)(4); *Limstrom*, 136 Wash.2d at 611, 963 P.2d 869. Justice Madsen joined the lead opinion “in the result.” *Limstrom*, 136 Wash.2d at 617, 963 P.2d 869.

The dissenting opinion signed by the remaining four Justices stated that the criminal discovery rule, not CR 26, should apply to determine whether the requested materials were discoverable under the Public Records Act. *Limstrom*, 136 Wash.2d at 617, 963 P.2d 869. The criminal discovery rule is narrower than the civil rule in defining work product. Documents are generally protected from disclosure under this rule only “to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies.” CrR 4.7(f)(1).

...

The question here is whether the prosecutor's office committed a

Public Records Act violation by deciding to follow the civil discovery rule in reliance on the plurality opinion in *Limstrom*. A plurality opinion is often regarded as highly persuasive, even if not fully binding. See *Texas v. Brown*, 460 U.S. 730, 737, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (plurality opinion) (holding that while one particular plurality opinion was “not a binding precedent, as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue”).

Our Supreme Court itself has cited the lead opinion in *Limstrom* as an interpretation by “this court”, and saying “we have held,” even while recognizing it as a plurality opinion. See *Soter v. Cowles Publishing Co.*, 162 Wash.2d 716, 733, 740, 174 P.3d 60 (2007). The dissenting opinion in *Limstrom* does not enjoy the same status. The lead opinion has extra weight considering that Justice Madsen concurred with the result (holding most records exempt), whereas the result of the dissenting opinion would have been to compel disclosure of all records. Koenig has not identified any authority he believes compelled the prosecutor to disclose documents such as the Kelly statement that were gathered in anticipation of litigation. Unlike in *Robinson*, there was no opinion other than the *Limstrom* lead opinion that the prosecutor might have chosen to follow.

We conclude it was not a violation of the Public Records Act for the prosecutor's office to withhold records based on the lead opinion in *Limstrom*.

Koenig, 151 Wn. App.at 426-428.

The Mr. Day's public records request on its face sought exactly what CR 26(b)(4) protects against -- i.e., the disclosure of attorney work product. Here, as shown above, the documents listed by the Prosecutor are privileged from disclosure because all were created or assembled "in anticipation of litigation" by having been either generated or gathered by or

for the Prosecutor for purposes of determining whether the State of Washington should file criminal charges against Mr. Day and/or generated or gathered for the actual criminal prosecution of Mr. Day. CP 130-132.

There are two general categories of work product.⁹ The first consists of “the mental impressions, conclusions, opinions, or legal theories of an attorney.” CR 26(b)(4). The Prosecutor’s legal analysis, communications or notes about witness interviews are accorded “heightened” absolute work product protection. *Soter*, 162 Wn.2d at 742; *See also*, CR 26(b)(4) (“the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”). As was pointed out in *Soter*, be-

⁹ In *West v. Thurston County*, 144 Wn. App. 573, 582-583, 183 P.3d 346 (2008), Division Two of the Court of Appeals discussed the 2007 Final Legislative Report and Legislature’s discussion of RCW 42.56.290. The Court quoted the 2007 Legislative Report as follows:

...[r]ecords that are relevant to a controversy to which an agency is a party that would not be discoverable to another party under the superior court rules of pre-trial discovery are exempt from disclosure under the [Public Records] Act.

Specifically exempt from disclosure is an attorney’s work product. The 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.

The attorney-client privilege also exempts certain public records from disclosure. The attorney-client privilege, however, is a narrow privilege and protects only communication or advice between attorney and client in the course of the attorney’s professional employment.

West, 144 Wn. App. at 582-583, quoting 2007 Final Legislative Report, 60th Wash. Leg. at 175 (underlining added).

cause a legal “team’s mental impressions, conclusions, opinions, or theories are almost always exempt from discovery, regardless of the level of need” and because the “attorney-client privilege exists to allow clients to communicate freely with their attorneys without fear of later discovery,” a legal team’s interviews of “witnesses constitute opinion work product that will be revealed only in rare circumstances, for example, where the attorney’s mental impressions are at issue or where there are issues of attorney crime or fraud.” “Forcing an attorney to disclose notes and memoranda of witnesses’ oral statements is particularly disfavored because it tends to reveal the attorney’s mental processes.” Thus, notes of attorneys and their investigators as well as a “memorandum drafted by the attorneys” and communications with clients were all protected. *Soter*, 162 Wn.2d at 737, 739, 741, 744-45.

As the *Limstrom* Court pointed out:

The mental impressions of the attorney and other representatives of a party are absolutely protected, unless their mental impressions are directly at issue.

Limstrom, 136 Wn.2d at 611.

Furthermore, the “notes or memoranda prepared by the attorney from oral communications should be absolutely protected, unless the attorney’s mental impressions are directly at issue.” *Limstrom*, 136 Wn.2d at 611-612.

The second category of work product consists of “formal or written statements of fact, or other tangible facts, gathered by an attorney in preparation for or in anticipation of litigation.” *Limstrom*, 136 Wn.2d at 611. The Supreme Court has held that such materials gathered by government attorneys in preparation for litigation are entitled to “ordinary work product” protection under the PRA rather than opinion work product, the first category. *See Soter*, 162 Wn.2d at 748. In *Limstrom*, where the plaintiff sought such things as “narrative police reports” and other documents assembled by the Prosecutor in criminal cases, our highest state Court held that “[a]pplication of the civil rule, CR 26(b)(4), to requests for disclosure of documents held in a public attorney’s files is consistent with the legislative intent of the work product exemption.” *Limstrom*, 136 Wn.2d at 609 and 614. The Supreme Court explained that such records from the Prosecutor’s files were protected because:

An attorney’s gathering of factual items and documents is protected from disclosure, under the work product rule set forth in CR 26(b)(4), 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 (underlining added). *See also* CR 26(b)(4).

Therefore, the *Limstrom* court held that “[w]ith respect to the fac-tual documents gathered by the prosecutor ... we hold the documents are part of the prosecutor’s fact-gathering process and are work product” and

“protected from disclosure.” *Limstrom*, 136 Wn.2d at 611 (underlining added). The material gathered by counsel is work product because an attorney’s “mental impressions, conclusions, opinions, or legal theories” are protected under CR 26(b)(1), and documents assembled by the prosecutor reveal “what information the attorney deemed particularly important and, conversely, what the attorney did not find important.” *Soter*, 162 Wn.2d at 743-744.

Finally, contrary to Mr. Day’s assertion that the holdings in *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010), dictate a different result, the converse is true and *Sanders*, in fact, supports the County’s position. The one of the main issues in *Sanders* involved what was a “controversy” for purposes of an exemption under the public records act. The *Sanders* court held that in order for a record to be exempt from disclosure as privileged attorney work product, the controversy to which the record are relevant must be completed, existing, or reasonably anticipated litigation. *Sanders*, 169 Wn.2d at 854-855. The *Sanders* court found that, for certain withheld documents in that case, those documents were not exempt from disclosure because they were not relevant to any pending, completed, or reasonably anticipated litigation. *Sanders*, 169 Wn.2d at 858.

Here, all of the withheld documents were from Mr. Day’s criminal prosecution. *Sanders* supports their exemption.

Therefore, the seventy-nine (79) pages of the disclosed documents that were withheld and not produced nor released to Mr. Day were records gathered by the Prosecutor's Office for purposes of litigation, were not introduced at trial, and were exempt from production and release to Mr. Day pursuant to the work product doctrine, RCW 42.56.290 and CR 26(b)(4).

B) The Plaintiff Could Obtain The Requested Records From Other Sources

The Prosecuting Attorney's Office notified Mr. Day that the (category two) exempt work product records that Mr. Day had requested (consisting of thirteen pages of police reports and 66 pages of witness interview transcripts) were available from the Mr. Day's criminal defense attorney and/or the Bonney Lake Police Department. Where the work product exemption is applicable, the office invoking it need not take steps to provide the documents unless the requester makes an affirmative showing of an inability to obtain the same documents elsewhere. CR 26(b)(4); *Koenig*, 151 Wn. App. at 429, citing *Limstrom*, 136 Wn.2d at 611, 963 P.2d 869.

CR 26(b)(4) states:

Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and 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, consultant, surety, indemnitor, insurer, or agent) only 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. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(Underlining added).

Mr. Day has never attempted to make an affirmative showing of his “substantial need” for the requested documents nor his “undue hardship” in obtaining the same documents elsewhere. Presumably that is because it is NOT possible for him to make such a showing - the category two work product records he wants from the Prosecutor’s Office are available from either his own criminal defense attorney or the City of Bonney Lake Police Department.

Though police reports and victim interview transcripts are “ordinary” work product rather than the “absolutely protected” opinion work product, such ordinary work product protection can be overcome only upon plaintiff demonstrating a “substantial need and an inability, without undue hardship, to obtain the documents or items from another source.” *See Limstrom*, 136 Wn.2d at 611. *See also* CR 26(b)(4). Mr. Day neither made such a showing to the trial court nor now did he meet his burden of demonstrating both a “substantial need” and that these documents were

not “available from other agencies” or through other means. *See e.g., Soter*, 162 Wn.2d at 748; and *Lindstrom*, 136 Wn.2d at 613.

C) The Prosecutor’s Office Was Not Required To Produce And Maintain A Separate Exemption Log Because It Properly Identified The Withheld Records

The Pierce County Prosecutor’s Office was not required to prepare or maintain a separate exemption log because it properly identified the withheld records.

Mr. Day, like Mr. Koenig in *Koenig v. Pierce County*, contends that the Prosecuting Attorney’s Office violated the Public Records Act by failing to properly identify the withheld records. The Court of Appeals disagreed with Mr. Koenig as the Court here should with Mr. Day:

The Public Records Act requires that an agency must provide a statement of explanation when a records request is refused. RCW 42.56.210(3) (formerly RCW 42.17.310(4)). “In order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency’s response to a requester must include specific means of identifying any individual records which are being withheld in their entirety.” *Progressive Animal Welfare Society v. University of Washington (PAWS)*, 125 Wash.2d 243, 271, 884 P.2d 592 (1994). A footnote in PAWS describes the type of the identifying information that should be provided to the requester:

The identifying information need not be elaborate, but should include the type of record, its date and number of pages, and, *unless otherwise protected*, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content. Where use of any identifying features whatever would reveal protected content, the agency may designate the records by a numbered sequence.

PAWS, 125 Wash.2d at 271 n. 18, 884 P.2d 592 (emphasis added).

The letter [DPA] Rose sent to Koenig on behalf of the prosecutor satisfied the statute by explaining that a certain number of pages of police reports and witness interview transcripts were being withheld as work product because they pertained to the charging decision. The prosecutor's office did not have to provide further identifying information because to do so would have disclosed protected content. The reason documents gathered in anticipation of litigation are protected under the civil discovery rules is because disclosing the identity of the documents reveals "what information the attorney deemed particularly important and, conversely, what the attorney did not find important." *Soter*, 162 Wash.2d at 743-44, 174 P.3d 60. Identifying the subject matter, date, author and other similar features of the police reports and transcripts would have permitted Koenig, who had access to the sheriff's investigative records, to compare them to the prosecutor's log of withheld documents and thereby identify which documents the prosecutor reviewed in the process of making the decision not to charge Gulla. This is precisely the information the prosecutor was entitled not to disclose. It so happened that the prosecutor's office did provide an exemption log to Koenig after he filed suit in 2007. It appears that receiving this log was the event that enabled Koenig to identify the Tara Kelly statement as an investigative record he had not received from the sheriff. We do not know why the prosecutor's office chose to provide an exemption log when it was under no duty to do so. But whatever the reason, the fortuity of receiving an exemption log from the prosecutor's office in 2007 does not provide Koenig with a cause of action for the prosecutor's failure to provide him with an exemption log in 2005 when he first requested documents.

Koenig, 151 Wn. App. at 429-430 (italics added by Court of Appeals in the original; underlining added).

Finally, again contrary to Mr. Day's assertion that the holdings in *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010), dictate a different result, the converse is true and *Sanders*, in fact, supports the County's po-

sition. In *Sanders*, the court found that where the “AGO failed to explain any of its claimed exemptions[,]” penalties could be awarded. *Sanders*, 169 Wn.2d at 859 However, the court went on to state that when withheld documents were correctly exempt but the explanations for the exemptions were deficient, it was not a violation of the public records act but just a matter in aggravation the court could consider when awarding penalties associated with the erroneously withheld documents. *Sanders*, 169 Wn.2d at 860-861.

Here, the Prosecuting Attorney’s Office properly identified and explained the exemption for the withheld documents. Mr. Day demands that a separate log should have been produced and maintained instead of giving him the explanations in a letter format. However, Mr. Day has failed to establish how the proffered explanations given him were deficient. Because no documents were erroneously withheld from Mr. Day, any claim of ‘explanation deficiency’ does not give rise to a violation of the public records act. *Sanders* supports the County’s position.

Here, the Prosecutor’s Office disclosed the precise number of sequentially-numbered pages that were exempt. This is exactly the same procedure as used with Mr. Koenig and upheld by the Court of Appeals in *Koenig v. Pierce County, supra*. Therefore, likewise in this case the County was not required to prepare a separate exemption log of exempt

work product documents. The explanatory information provided to Mr. Day met the statutory requirement. *See Koenig*.

D) The Work Product Exemption Continues To Exist Even After The Underlying Litigation Has Ended

Mr. Day is wrong when he states that the Prosecutors Office must disclose exempt work product because his criminal case has concluded. First off, at the time of the request denial, his criminal case has not been terminated because the Plaintiff has appealed the Court of Appeals' decision upholding his criminal conviction. CP 130-132 at ¶ 6.

Secondly, even if one assumed that Mr. Day's criminal case had concluded, the Washington State Supreme Court has clearly held that the work product doctrine continues despite the fact that the underlying litigation has ended. In *Soter*, the Supreme Court examined what RCW 42.56.290 meant by the word "controversy." The Court held:

... We have defined the term "controversy" as "completed, existing, or reasonably anticipated litigation." *Dawson*, 120 Wash.2d at 791, 845 P.2d 995. We have recognized that RCW 42.56.290's protection is triggered "prior to the official initiation of litigation and extends beyond the official termination of litigation." *Id.* at 790, 845 P.2d 995. Furthermore, where the work product doctrine is concerned, it is well-settled that the protection applies to materials created in anticipation of litigation, even after that litigation has terminated. *See Harris v. Drake*, 152 Wash.2d 480, 489-90, 99 P.3d 872 (2004); *see also Limstrom*, 136 Wash.2d at 613, 963 P.2d 869, and *Pappas v. Holloway*, 114 Wash.2d 198, 210, 787 P.2d 30 (1990).

Soter, 162 Wn.2d at 732 (underlining added).

The *Soter* Court explained the rationale for its conclusion that work product continues after litigation ends:

The dissent ignores the well-settled parameters of the controversy exception discussed in *Harris*, 152 Wash.2d at 489-90, 99 P.3d 872; *Limstrom*, 136 Wash.2d at 613, 963 P.2d 869; *Dawson*, 120 Wash.2d at 791, 845 P.2d 995; *Pappas*, 114 Wash.2d at 210, 787 P.2d 30, and without citation, advocates disclosure of attorney work product once a controversy has been resolved. Dissent at 82-83. This court has repeatedly discussed the principle that the work product protection can be preserved only if it continues even after the prospect of litigation has terminated. *E.g.*, *Harris*, 152 Wash.2d at 489-90, 99 P.3d 872. We have explicitly rejected the view advocated by the dissent, finding instead that protection both before reasonably anticipated litigation and after resolution of a controversy comply with the “clear intent of the statute.” *Dawson*, 120 Wash.2d at 791, 845 P.2d 995. “We do not distinguish between completed and pending cases,” in part because the looming possibility of disclosure, even disclosure after termination of the lawsuit, would cause clients and witnesses to hesitate to reveal details to the attorneys, and it would cause attorneys to hesitate to reduce their thoughts or understanding of the facts to writing. *Limstrom*, 136 Wash.2d at 613, 963 P.2d 869; *Pappas*, 114 Wash.2d at 209-10, 787 P.2d 30 (citing *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947)).

Soter, 162 Wn.2d at 732-733 (underlining added).

The fact that Mr. Day’s criminal case had terminated does not now magically make the exempt work product records collected for that criminal litigation suddenly non-exempt. Once work product, always work product. The Prosecutor’s Office did not err by refusing to release exempt work product records to Mr. Day just because his criminal case had concluded.

2. The Case Must Be Dismissed For Insufficiency Of Service Of Process Because Mr. Day Never Served Pierce County

The alternate grounds upon which Pierce County moved the trial court for summary judgment were that the case should be dismissed for insufficiency of service of process because Mr. Day never served Pierce County. The evidence is undisputed on this fact both by Mr. Day and the County.

A. Because Pierce County Was Never Served, The Case Must Be Dismissed For Insufficiency Of Service Of Process

In order to bring an appropriate action in Washington State challenging the actions, policies, or customs of a local governmental unit, a plaintiff must name the county or city itself as a party to the action, and not the particular municipal department or facility where the alleged violation occurred:

Plaintiff includes the Seattle Police Department as a named defendant in his First Amended Complaint. Dkt. No. 6 at 2. In order to bring an appropriate action challenging the actions, policies or customs of a local governmental unit, a plaintiff must name the county or city itself as a party to the action, and not the particular municipal department or facility where the alleged violation occurred. See *Nolan v. Snohomish County*, 59 Wash.App. 876, 883, 802 P.2d 792, 796 (1990). Here, the Seattle Police Department is not a legal entity capable of being sued. It is therefore dismissed as a defendant in this case.

Bradford v. City of Seattle, 557 F.Supp.2d 1189, 1207 (W.D. Wash.

2008) (citation in the original, underlining added)¹⁰.

By his signed declarations, Eugene Bremner stated that he personally served only Mark Lindquist with a copy of the Summons and Complaint and specifically stated that he did not serve the Pierce County Auditor's Office. Mr. Bremner alleges that his service of Mark Lindquist and his failure to serve the Auditor's Office was the result of being misled by un-named individuals at both the Prosecuting Attorney's Office and the Auditor's Office. CP 26, 111-112.

RCW 4.28.080(1) requires a plaintiff to serve the county auditor.

It provides in part:

Service made in the modes provided in this section shall be taken and held to be personal service. The summons shall be served by delivering a copy thereof, as follows:

(1) If the action be against any county in this state, to the county auditor or, during normal office hours, to the deputy auditor, or in the case of a charter county, summons may be served upon the agent, if any, designated by the legislative authority.¹¹

¹⁰ *Nolan v. Snohomish County*, 59 Wn. App. 876, 883, 802 P.2d 792, 796 (1990), held:

RCW 36.32.120(6), read together with RCW 36.01.010 and .020, makes clear the legislative intent that in a legal action involving a county, the county itself is the only legal entity capable of suing and being sued. It follows that a county council is not a legal entity separate and apart from the county itself.

¹¹ Although Pierce County is a charter county, the Pierce County Council has not elected to designate an agent for service of process. Therefore, any summons must be served on the County Auditor. This is consistent with the Pierce County Charter, which also utilizes the Pierce County Auditor's Office for routine filings. Section 5.90 of the Pierce County Charter, "Filing Officer," indicates that "The term filing officer as used throughout this Charter shall mean the Auditor or such other county department head as may be desig-

(Underlining added).

Mr. Day never served the Pierce County Auditor. “When a statute designates a particular person or officer upon whom service of process is to be made in an action ... no other person or officer may be substituted.” *Davidheiser v. Pierce County*, 92 Wn. App. 146, 153, 960 P.2d 998 (1998), *rev. denied* 137 Wn.2d 1016, 978 P.2d 1097 (1999) quoting *Meadowdale Neighborhood Comm. v. City of Edmonds*, 27 Wn. App. 261, 264, 616 P.2d 1257 (1980); *Nitardy v. Snohomish County*, 105 Wn.2d 133, 134-35, 712 P.2d 296 (1986); *Landreville v. Shoreline Comm. College Dist. No. 7*, 53 Wn. App. 330, 332, 766 P.2d 1107 (1988).

Like the Seattle Police Department in *Bradford v. City of Seattle*, and the County Council in *Nolan v. Snohomish County*, the Pierce County Prosecuting Attorney’s Office “is not a legal entity capable of being sued[,]” only Pierce County is. Both state statute and county charter require that to sue Pierce County, the Pierce County Auditor must be served. Because it is undisputed that the Pierce County Auditor was never served, this case must be dismissed for insufficiency of service of process.

B. The Doctrine Of Equitable Estoppel Does Not Apply Here

nated by ordinance.”

To Overcome Insufficiency Of Service Of Process

Mr. Day claims that the doctrine of equitable estoppel bars Pierce County from making its motion to dismiss for insufficiency of service of process. However, Mr. Day had an opportunity to cure his improper service but chose not to do so, therefore, equitable estoppel does not apply.

Though it is highly unlikely that counter personnel at the Pierce County Auditor's Office or the Pierce County Prosecutor's Office would act as Mr. Bremner claims they did in his declarations, even if Mr. Bremner's facts are true, equitable estoppel does not apply to representations of law. *Davidheiser v. Pierce County*, 92 Wn. App. 146, 960 P.2d 998 (1998), *rev. denied* 137 Wn.2d 1016, 978 P.2d 1097 (1999). Mr. Day presents no authority that representations made by un-named counter personnel are agents of a government with the authority to waive legal defenses of that government for purposes of being estopped from asserting a defense.

In *Davidheiser*, the County asserted improper service as a defense when Davidheiser's attorney served the County's Risk Management Department. The attorney's secretary called the Risk Management Department and, after identifying herself, asked where the summons and complaint should be served. According to the secretary, an unidentified person said, "here," and then gave the address to the Risk Management De-

partment. Davidheiser argued that the County should be equitably estopped from asserting the insufficiency of service defense because of the unidentified employee's statement that the summons and complaint should be served with Risk Management.

The Court of Appeals affirmed the trial court's granting of the County's motion for summary judgment. It said:

The party asserting estoppel must show not only lack of knowledge of the facts, but also the absence of any convenient and available means of acquiring such knowledge. (Citations omitted) Generally, equitable estoppel does not apply to representations of law. When a statute designates a particular person or officer upon whom service of process is to be made in an action . . . no other person or officer may be substituted.

Davidheiser, 92 Wn. App. at 153. The Court went on to say:

Moreover, even if Davidheiser could have reasonably relied on the representation to serve the summons and complaint on the Risk Management Department, such reliance was no longer reasonable after the County served its answer asserting that service was improper. Because the defense was raised within the statute of limitations, Davidheiser could have properly served the County pursuant to RCW 4.28.080(1) within the statutory period.

Davidheiser, 92 Wn. App. at 154-155.

The instant case is virtually identical to *Davidheiser*. Even if, as Mr. Day asserts, his process server, Mr. Bremner, reasonably relied upon representations made by un-named office personnel on where to serve the summons and complaint, such reliance was no longer reasonable once Pierce County served its motion on Mr. Day asserting that service was

improper because the defense was raised by Pierce County within the one year statute of limitations for filing an action under the public records act (RCW 42.56.550(6)¹²) and Mr. Day “could have properly served the County pursuant to RCW 4.28.080(1) within the statutory period.”

The doctrine of equitable estoppel does not apply here to overcome Mr. Day’s insufficient service of process.

3. Requests For Discovery, Discovery Sanctions, and In Camera Review Were Properly Denied

Mr. Day asserts that the trial court improperly denied him discovery and discovery sanctions against Pierce County as well as improperly denying him an in camera review of the withheld documents. The trial court properly denied these requests.

A. In Public Records Cases Discovery and Discovery Sanctions Cannot Be Used To Thwart The Attorney Work Product Exemption

Mr. Day served a discovery request upon Pierce County. Mr. Day’s fifteen interrogatory requests and sixteen requests for production were designed to obtain the withheld confidential work product informa-

¹² RCW 42.56.550(6) states: “Actions under this section must be filed within one year of the agency’s claim of exemption or the last production of a record on a partial or installment basis.” Assuming the latest date possible for the agency’s claim of exemption was the September 25, 2009, letter to Mr. Day from DPA Murphy (CP 156-157), the one year statute of limitation would not have run until September 25, 2010. Pierce County filed and served its motion asserting its defense of improper service on Mr. Day on March 3, 2010, (CP 56-87), a full six months before the statute of limitations would have run.

tion. Pierce County objected and the trial court agreed. Discovery cannot be used to defeat the work product exemption.

The Public Records Act requires local governments to either provide the requested public record if it exists, or to deny the public record request if the document either does not exist, or exists but is exempt from public disclosure. *See* RCW 42.56.070 and .520. The Public Records Act does not require a local government to research or explain its documents, its processes (including but not limited to those un-related to handling public records request processes), the thought processes of its attorneys, or to create a new document that either explains its documents or processes. Instead, the Act only requires an agency to make the non-exempt records it has accessible to the public. *Smith v. Okanogan County*, 100 Wn. App. 7, 12 and 18, 994 P.2d 857 (2000), citing *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), at 12; and *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-162, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975), at 18. *See also Building Industry Assn. of Washington v. McCarthy*, 152 Wn. App. 720, 218 P.3d 196 (2009); and *Neighborhood Alliance v. County of Spokane*, 153 Wn. App. 241, 224 P.3d 775 (2009).

The Public Records Act closely parallels the federal Freedom of Information Act (FOIA) “and judicial interpretations of that Act are

therefore particularly helpful in construing our own.” *Smith*, 100 Wn. App. at 13. *See also Hearst Corporation v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978). In general, discovery is not part of a FOIA case, and the decision whether to allow discovery rests within the discretion of the trial court. *Schiller v. Immigration & Naturalization Service*, 205 F.Supp.2d 648, 653 (W.D.Tex.2002). Federal courts typically dispose of FOIA cases on motions for summary judgment before a plaintiff is able to conduct discovery. *Neighborhood Alliance*, 153 Wn. App. at 15 citing *Schiller v. Immigration & Naturalization Service*, 205 F.Supp.2d at 653, and *Rugiero v. U.S. Dep’t of Justice*, 257 F.3d 534, 544 (6th Cir.2001).¹³

¹³ A trial court should grant judgment where a plaintiff then “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 & 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In other words:

A defendant in a civil action is entitled to summary judgment when that party shows that there is an absence of evidence supporting an element essential to the plaintiff’s claim. The defendant may support the motion by merely challenging the sufficiency of the plaintiff’s evidence as to any such material issue. In response the nonmoving party may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists.

Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 198, 831 P.2d 744 (1992). *See also Tinder v. Nordstrom*, 84 Wn. App. 787, 791, 929 P.2d 1209 (1997) (a defendant’s burden on summary judgment “may be met by pointing out that there is an absence of evidence in support of the nonmoving party’s case.”).

When discovery is permitted it is to be “sparingly granted.” *Public Citizen Health Research Group v. Food & Drug Admin.*, 997 F. Supp 56, 72 (D.D.C.1998), *aff'd in part, rev'd on other grounds*, 185 F.3d 898 (D.C.Cir.1999). It is limited to whether complete disclosure has been made by the agency in response to a request for information. In fact, when courts have permitted discovery in FOIA cases, it generally is limited to the scope of the agency’s search and its indexing and classification procedures. *Schiller*, 205 F.Supp.2d, at 653-654. Discovery which seeks information concerning “the policies, procedures, and operational guidelines” for an agency's operations “far exceeds the limited scope of discovery usually allowed in a FOIA case concerning factual disputes surrounding the adequacy of the search for documents.” *Schiller*, 205 F.Supp.2d, at 654.

Pierce County objected to Mr. Day’s discovery efforts. The County requested that the trial court not grant permission to conduct dis-

In Washington State, it is typical to resolve public records litigation through such a summary judgment process. *See e.g. Koenig v. Pierce County*, 151 Wn. App. 221, 211 P.3d 423 (2009), and *Sperr v. City of Spokane*, 123 Wn. App. 132, 136, 93 P.3d 1012 (2004) (where public records claims were dismissed on summary judgment). *See also Spokane Research & Defense Fund v. Spokane*, 155 Wn.2d 89, 106, 117 P.3d 1117 (2005) (“summary judgment is an appropriate procedure in PDA cases”) and *Neighborhood Alliance v. County of Spokane*, 153 Wn. App. 241, 224 P.3d 775 (2009).

Here, Defendant Pierce County met its burden for moving for summary judgment by amply demonstrating the absence of evidence to support the nonmoving party Mr. Day’s case.

covery (stating that without such permission, the County would not respond), that if the Court did permit discovery, it should be used “sparingly,” and alerted the court that Mr. Day was attempting to obtain documents through discovery that he was not entitled to, i.e. privileged work product collected, gathered and prepared by the Pierce County Prosecuting Attorney’s Office in preparation for and in use during litigation -- the criminal prosecution of Mr. Day. In response, Mr. Day demanded sanctions be imposed against Pierce County because it did not comply with CR 26(f) and CR 26(i) before making its Objection to Plaintiff’s First Discovery.

Mr. Day contended that CR 56(f) permitted a party to oppose summary judgment when discovery is sought because materials facts were in dispute and that it provides for discovery and a stay of summary judgment pending discovery. However, CR 56(f) actually goes on to state:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(Underlining added). Mr. Day made no showing of any reasons why he could not present by affidavit facts essential to justify his opposition,

therefore, CR 26(f) and CR 26(i) did not apply.

The facts are well known in this case and they are undisputed. The identity of the requested and denied documents is clear; i.e., Mr. Day wanted police investigative reports from one law enforcement officer, fingerprint reports, and statements from four witnesses. There is no factual dispute that the privileged documents at issue were created or gathered in anticipation of criminal litigation by the Prosecuting Attorney's Office. Specific items were requested and they were denied for specific reasons.

The trial court properly denied Mr. Day permission to conduct discovery and to impose discovery sanctions. In public records cases discovery and discovery sanctions cannot be used to thwart the attorney work product exemption.

B. In Camera Review Was Properly Denied Because The Trial Court Could Determine From The Face Of Pleadings And Supportive Declarations That Withheld Documents Were Attorney Work Product

Mr. Day is emphatic that when he requested an in camera review of the withheld documents, the public records act requires that the court must grant that request. This is simply not the law.

Whether in camera review is necessary to determine whether record is subject to public disclosure is generally left to discretion of trial

court. *Harris v. Pierce County*, 84 Wn. App. 222, 235, 928 P.2d 111 (1996). Trial court's decision whether in camera review is necessary for documents which are subject of Public Disclosure Act request is reviewed only for abuse of discretion. *Yakima Newspapers, Inc. c. City of Yakima*, 77 Wn. App. 319, 328, 890 P.2d 544 (1995).

In *Harris*, the Court of Appeals held that the trial court did not abuse its discretion by declining to view memorandum in camera before ruling on motion to compel discovery of memorandum, because of the ability of the trial court to determine from face of pleadings and supportive affidavits that memorandum contained legal opinions and recommendations so as to be protected under attorney-client privilege and work product rule. *Harris*, 84 Wn. App. at 235-236.

Here, like in *Harris*, an in camera review was an option that the trial court had before it in this case, but it was not necessary. The records requested by Mr. Day were clear enough for the court to determine whether the Prosecuting Attorney's Office properly refused to release those records as attorney work product. Mr. Day was denied police investigative reports from one law enforcement officer (Loree Barnett), fingerprint reports, and statements from four witnesses. These law enforcement investigation reports and statements were clearly created or gathered in anticipation of criminal litigation. The trial court held that there no need

for an in camera review and denied Mr. Day's motion.

The trial court did not abuse its discretion when it refused to conduct an in camera review of the withheld documents because it could determine from face of pleadings and supportive affidavits that documents were attorney work product.

4. Miscellaneous Issues on Appeal

In his opening brief, Mr. Day assigned errors to other issues.

A. Failure To File Certificate Of Service And Note Of Issue With The Court Precluded The Court From Setting CR 12(B) And CR 55 Motions

Mr. Day argues that his rights were violated when the trial court refused hearing dates for his ex-parte motions under CR 12(b) and CR 55. However, putting aside the fact that Mr. Day conducted improper service as argued above, Mr. Day doesn't provide any authority that required the trial court to set those hearings when he failed to file with the court any evidence that he served anyone anything ("Certificate of Service"), in violation of CR 4(g), nor does Mr. Day provide any authority that required the trial court to set a hearing when he failed to file a Notice of Issue with the court in violation of Pierce County Superior Court Local Rule PCLR 3(c).

In the case of the Certificate of Service, Mr. Day just included an un-filed copy of one as an exhibit with his default motion. CP 26. In the

case of the Note of Issue, Mr. Day also just included an un-filed copy of one with his default motion. The trial court would have had to read and consider Mr. Day's motion in advance of any decision to set a hearing for same. The court is not required to do that.

Because CR 4(g) and PCLR 3(c) required Mr. Day to file with the court his Certificate of Service and Notice of Issue, respectively, and not just submit them as exhibits with his motion, the trial court did not deny Mr. Day his rights by not setting a hearing date for his motion, regardless of the fact that Mr. Day conducted improper service, as argued above.

B. Orders Granting Summary Judgment Must Meet The Requirements Of CR 56 And Not CR 54

Mr. Day asserts that the order granting Pierce County summary judgment was deficient because it did not contain the findings of fact and conclusions of law required by CR 54. Requirements for valid orders granting summary judgment are found under CR 56 and not CR 54.

CR 56(h) states:

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

Here, the trial court order granting Pierce County summary judgment contained the requisite requirements of CR 56(h) because it contained the documents and other evidence relieved upon by the court. CP 117-119.

III. CONCLUSION

In his Complaint, Mr. Day claimed that the Prosecuting Attorney's Office refused "to disclose non-exempt public records and as applied to some, improperly responding to and improperly claiming statutory exemptions. Mr. Day also alleged that the Prosecuting Attorney's Office "acted intentionally, maliciously and in egregious bad faith in failing to properly respond to petitioner's PRA requests at issue in this case." Yet, Mr. Day provided no facts to support these allegations.

For the reasons stated in the analysis above, Pierce County has amply demonstrated that there are no factual disputes on whether the documents at issue were created or gathered in anticipation of criminal litigation by the Prosecuting Attorney's Office and, as such, are attorney work product exempt from production and release under the public records act. It is respectfully requested that this Court affirm the trial court's grant of summary judgment in favor of Pierce County.

DATED this 28TH day of June, 2011.

MARK LINDQUIST
Prosecuting Attorney

By 
DAVID B. ST. PIERRE / WSB# 27888
Deputy Prosecuting Attorney
Attorneys for Pierce County
PH: 253-798-6503 / FAX: 253-798-6713

CERTIFICATE OF SERVICE

11 JUN 30 PM 1:10
STATE OF WASHINGTON
BY  DEPUTY

I hereby certify that a true copy of:

1. the foregoing BRIEF OF RESPONDENT, and
2. the June 28, 2011 SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY – No. 09-2-16411-3/ Court of Appeals No. 40730-2 - CLERK’S PAPERS PER REQUEST OF RESPONDENT TO THE COURT OF APPEALS, DIVISION II (46 pages)

were delivered this 28th day of June, 2011, to the U.S. Postal Service, postage prepaid, with appropriate instruction to forward the same to the following:

Larry Day
#307673 H3 A17
Stafford Creek Correction Ctr.
191 Constantine Way
Aberdeen, WA 98520

Larry Day
c/o Wallace & Wallace
107 South Houston St.
East Wenatchee, WA 98802



ANDREA HILL