

No. 231364

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION III

CODY SOTER, a minor child; FRANCIS SOTER and GLENDA CARR,
individually, and as parents of CODY SOTER; THE ESTATE OF
NATHAN WALTERS, a deceased minor child; RICK WALTERS and
TERESA WALTERS, a deceased minor child; and SPOKANE SCHOOL
DISTRICT NO. 81, a Washington municipal corporation,

Respondents.

v.

COWLES PUBLISHING COMPANY, a Washington corporation,

Appellant,

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION
OF MUNICIPAL ATTORNEYS

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On Behalf of
Washington State Association of Municipal Attorneys

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association of Municipal Attorneys (WSAMA) is a not-for-profit corporation organized under the laws of Washington. WSAMA has an interest in the rights and obligations of cities and towns in this State in their efforts to respond to and resolve claims, settle or try lawsuits, and represent the public at the grass roots level of government organization.

II. STATEMENT OF FACTS

The background facts are set forth in the parties' briefing. *See* Spokane School District No. 81 ("School District") Br. at 4-27. For purposes of this amicus curiae brief, the facts set forth in the brief of the School District are adopted.

III. ISSUE PRESENTED

Must a public agency that has conducted an immediate investigation of a serious accident it knows or reasonably believes will lead to litigation disclose the contents of that investigation to persons filing a Public Disclosure Act (ch. 42.17 RCW) request, notwithstanding the provisions of RCW 42.17.310(1)(j)?

IV. SUMMARY OF ARGUMENT

RCW 42.17.310(1)(j) is clear and unambiguous. It provides that certain records are exempt from the disclosure requirements of the PDA: "Records which 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” (hereinafter this will be called “Exemption (j)”).

The position of Appellant herein would render this section meaningless, notwithstanding several decisions of the Supreme Court holding that it is, indeed, to be followed and has meaning. In addition, decisions of federal courts construing the federal Freedom of Information Act, which decisions are entitled to persuasive but not controlling weight in this Court, have given the same meaning to this exemption as Respondents posit here.

WSAMA urges this Court to follow both State and federal precedent and hold: (1) that Exemption (j) applies to pre-claim investigations, just like CR 26(b) work product and privilege exemptions from civil discovery apply to pre-claim investigations; (2) that the CR 26(b)(4) exception to the work product doctrine for “substantial need” cannot apply to PDA disclosures, and (3) that the PDA was not designed as a tool for the benefit of those contemplating or bringing damage claims against agencies in this State, to allow such litigants direct or indirect access to the mental impressions, preparations, and efforts of agencies and their representatives to protect public treasuries from such claims.

V. ARGUMENT

A. BOTH WASHINGTON PRECEDENT AND PERSUASIVE FEDERAL CASES PERMIT NONDISCLOSURE OF MATERIALS PREPARED IN ANTICIPATION OF LITIGATION, WITHOUT REGARD TO THE PRESENT STATUS OF SUCH LITIGATION.

The Respondents have done a good job of presenting the Washington cases holding that disclosure of materials prepared in anticipation of litigation is not required, whatever the current status of the litigation. *See Harris v. Drake*, 152 Wn.2d 480, 490, 99 P.3d 872 (2004); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 608-09, 963 P.2d 869 (1998); and *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993). *Limstrom* relied in part upon federal Freedom of Information Act cases to decide that the exemption for materials unavailable to another party in litigation (Exemption (j)), *see* 136 Wn.2d at 608, *citing NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), and other cases, and therefore the federal cases should be considered as bearing on the question.

Federal Trade Commission v. Grolier, Inc., 462 U.S. 19, 103 S. Ct. 2209 (1983), discussed in *Limstrom*, held that Exemption 5 from the FOIA (the federal equivalent of Exemption (j)) applied to documents generated in an investigation of one of the requestor's subsidiary corporations. The requestor argued, as appellants do here, that the documents sought (covered by the attorney work product privilege) *could* be available to a

party opposing the agency in litigation. The Court flatly rejected this argument, however, and held that the work product privilege exemption “establish[es] a discrete category of exempt information.” 462 U.S. at 26. This exemption applied regardless of the status of the litigation for which the documents were prepared. *Id. See also Jiminez v. Federal Bureau of Investigation*, 938 F.Supp. 21 (D.D.C. 1996) (investigation materials exempt).

In *Hanson v. United States Agency for International Development*, 372 F.3d 286 (4th Cir. 2004), a contractor in litigation with another contractor sought materials prepared for USAID and the other contractor in anticipation of the litigation between contractors. The court, having first held that an attorney-client relationship existed, held that the materials were work product and not subject to disclosure.

The *Hanson* court stated that the work product exemption “provide[s] a zone of privacy within which to think, plan, weigh facts and evidence, candidly evaluate a client’s case, and prepare legal theories.” 372 F.3d at 292, *quoting Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 864 (D.C.Cir. 1980). *Hanson* added that the “attorney work product exemption includes factual information prepared by an attorney in anticipation of litigation.” 372 F.3d at 293, *quoting Martin v. Office of Special Counsel*, 819 F.2d 1181, 1187 (D.C.Cir. 1987).

Hanson is directly applicable here, both in its holding and in its rationale. Cities in this State are entitled to and need the same legal

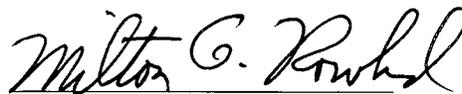
counsel as private corporations have, and the legislature clearly had that need in mind when it adopted Exemption (j). *See Grolier and Sears*, both *supra*.

WSAMA urges this Court to adopt the reasoning of the trial court and used in *Limstrom, Dawson, Hangartner, Grolier, Sears, and Hanson*. Any other result would be catastrophic for agencies, which would lose the ability to “think, plan, weigh facts and evidence,” in that zone of privacy that permits candor.

VI. CONCLUSION

This Court should affirm the decision of the Honorable Judge Leveque below, for the reasons stated herein.

DATED this 15th day of November, 2005.



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CERTIFICATE OF SERVICE

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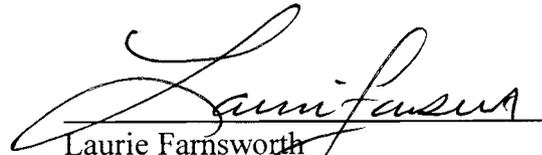
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