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No. 231364

FILED  
APR 11 1996  
COURT OF APPEALS DIVISION III

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STATE OF WASHINGTON

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

Respondents,

v.

COWLES PUBLISHING COMPANY, a Washington corporation,

Appellant.

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**RESPONDENT SPOKANE SCHOOL DISTRICT NO. 81's  
ANSWER TO AMICUS CURIAE BRIEF OF  
WASHINGTON COALITION FOR OPEN GOVERNMENT**

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Respondent Spokane School District No. 81 (“the School District”) respectfully submits that the majority of the arguments set forth in the Amicus Curiae Brief of the Washington Coalition for Open Government (“Coalition”) are new arguments never raised by Petitioner Cowles Publishing Company (“Cowles”). They therefore should be disregarded.<sup>1</sup> Regardless, those impermissible new arguments, as well as those in which the Coalition does supplement points previously argued by Cowles, fail.

**I. The Coalition’s “Substantial Need” Arguments Were Not Raised By Cowles and Should Not Be Considered; Regardless, They Are Meritless.**

The School District established by a virtual Mount Everest of evidence below that in this very unique case, each document at issue was generated by the School District, or by its general counsel/insurance defense counsel, or by their representatives, in anticipation of a very nearly certain substantial wrongful death claim. That evidence established that literally within minutes of Nathan Walters’ death, those persons’ anticipation of litigation was not only actually subjectively held, it was further an eminently objectively reasonable anticipation given the initially-reported facts.

Thus it has always been clear in this case that each of the disputed documents falls within the threshold protection of the work product doctrine,

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<sup>1</sup> “[W]e will not address arguments raised only by amicus.” *Citizens for Resp. Wildlife Mgmt. v. State*, 149 Wash. 2d 622, 631, 71 P.3d 644 (Wash. 2003), citing *Sundquist Homes, Inc. v. Snohomish County PUD No. 1*, 140 Wash.2d 403, 413, 997 P.2d 915 (2000). “It is... well established that appellate courts will not enter into the discussion of points raised only by amici curia.” *Long v. Odell*, 60 Wash.2d 151, 154, 372 P.2d 548 (1962), citing *Roehl v. Public Utility District No. 1*, 43 Wash.2d 214, 231, 261 P.2d 92 (1953) and numerous cases from other jurisdictions.

and therefore within the “controversy” exemption to the Public Disclosure Act (RCW 42.17 *et. seq.*, also referenced as “PDA” herein), at RCW 42.17.310(1)(j). Cowles’ argument therefore all along has been that it has carried its burden of proving that it has a “substantial need” for the requested materials and that its reporting staff could not, without undue hardship, obtain substantially equivalent information concerning Nathan’s death through other means.

The Coalition now offers two entirely new “substantial need” arguments. First, the Coalition argues that in evaluating whether the work product doctrine has been overridden by a showing of substantial need, the person or entity whose “need” is to be examined is not that of the one who is seeking the document from the public agency. Rather, the Coalition now argues, the need to be examined is the hypothetical need that might have existed for the person or entity who originally was adverse to the agency when the document was generated (i.e., here, the speculative “need” of the Walters or their counsel had they hypothetically filed a lawsuit and the underlying claims not been settled). This argument departs from Cowles’ own position.

Second, the Coalition argues, whereas Cowles did not, that the burden of proving the necessary elements attendant to “substantial need” falls not with the party who is seeking the documents under the Public Disclosure Act – here, Cowles. Instead, the Coalition argues, the burden falls on the public agency – here, the School District – to somehow prove the speculative

negatives that: (1) had the Walters filed suit and not settled their underlying wrongful deal claims, they and their counsel would never have had a substantial need for the documents to prepare their hypothetical case; or (2) had that hypothetical course been followed, the Walters and their counsel could have, without undue hardship, obtained information substantially equivalent to that which is reflected in the disputed documents.

The Court should not address these novel arguments raised solely by the Coalition, based on the well-established rule that arguments raised for the first time by an amicus will not be considered. *E.g., Citizens for Resp. Wildlife Mgmt., supra; Long, supra.* And as a substantive matter, the two propositions urged by the Coalition have no support in the face of the uniform, contrary holdings of all of the Washington decisions that have applied “substantial need” work product doctrine principles in the context of the PDA.

In *Limstrom v. Landenberg*, 136 Wash.2d 595, 963 P.2d 869 (1998) our Supreme Court first adopted an analytical model that specifically rejects the Coalition’s arguments. The PDA requester in *Limstrom* sought documents that had been generated by the Pierce County Prosecutors Office in its defense of some 54 criminal litigation matters. The Prosecutor claimed the documents constituted work product and withheld them. *Id.* at 601-02. Our Supreme Court held that at least certain of the documents were protected as work product and proceeded to state:

[T]he documents are part of the prosecutor's fact-gathering process and are work product. Consequently, these documents are protected from disclosure unless Mr. Limstrom is able to demonstrate a substantial need and an inability to obtain the documents from other sources.

*Id.* at 614-15 (emphasis added). The Court in *Limstrom* then held that the requester had failed to carry that burden, and thus the documents had been properly withheld by the agency. *Id.*

*Limstrom* thus plainly teaches that in the PDA context: (1) once an agency demonstrates that records are work product doctrine, they are properly withheld from production unless the requester carries the burden of proving substantial need and no alternative means to obtain the substantial equivalent without undue hardship; and (2) the need that is examined is the requester's need – not that of the persons with whom the agency had the controversy at the time the records were created (i.e., in *Limstrom*, the 54 litigants with whom the agency had had disputes when the records were created) .

In accord with *Limstrom* is the recent case of *Kleven v. King County Prosecutor*, 112 Wash. App. 18, 53 P.3d 516 (2002), another work product/substantial need case decided under the PDA's controversy exemption at RCW 42.17.310(1)(j). There the court held:

[W]ritten statements gathered by an attorney and other agency representatives are subject to disclosure only upon a showing that the party seeking disclosure of the documents actually has substantial need of the materials and that a party is unable, without undue hardship, to obtain the substantial equivalent of the materi-

als by other means. Here, the notes are not available to Kleven for the additional reason that **he fails to make** a showing of **substantial need for them as required under the rule**. His argument that he possesses a substantial need for the notes simply because he does not have them is without merit. We conclude that access to the requested notes was properly denied under an exception to the Public Records Act.

*Id.* at 24-25 (emphasis added; footnote omitted). *Kleven* therefore also holds that it is the requester that bears the burden of proof on the substantial need elements, and, as in *Limstrom*, it is the requester's purported need that is examined.

Another PDA case directly refuting the positions urged here by the Coalition is *Overlake Fund v. City of Bellevue*, 70 Wash. App. 789, 855 P.2d 706 (1993), *review denied*, 123 Wash.2d 1009, 869 P.2d 1084 (1994). After holding the documents there were work product, the Court of Appeals proceeded as follows:

We must next determine whether Overlake is entitled to have the documents produced because it has a substantial need for them and would be unable to obtain substantially equivalent information by other means. In *Heidebrink v. Moriwaki*, 104 Wash.2d 392, 706 P.2d 212 (1985), the court stated that in order to justify disclosure of information

a **party must show** the importance of the information to the preparation of **his case** and the difficulty **the party** will face in obtaining substantially equivalent information from other sources if production is denied. ...

(Citations omitted.) *Heidebrink*, 104 Wash.2d at 401, 706 P.2d 212.

In this case, Overlake could, and indeed did, have its own appraisal prepared. Therefore, **Overlake cannot demonstrate a**

**substantial need** for the documents. Accordingly, the requested documents fall within the work product doctrine and are exempt from the public disclosure act under RCW 42.17.310(1)(j).

*Overlake Fund*, 70 Wash. App. 794-95.

Again therefore, the court in *Overlake Fund* required the PDA re-  
quester to carry the burden of proving that it had a substantial need and it had no alternative means to obtain substantially equivalent information.

Yet another case that refutes the Coalition's arguments is *Harris v. Pierce County*, 84 Wash. App. 222, 928 P.2d 1111 (1996). With respect to application of the work product doctrine, the court made clear – like in *Limstrom*, *Kleven*, and *Overlake Fund* – that the requester bears the burden of affirmatively proving that he (and no one else) has a substantial need and he (and no one else) is unable without undue hardship to obtain substantially equivalent information via alternative means:

Here, the requested memorandum was prepared in anticipation of litigation. Legal counsel prepared the memorandum to assist the County Council in disposing of CAT's appeal regarding the sufficiency of the EIS. Counsel was likely aware that denial of CAT's appeal would result ....

Moreover, **CAT has not demonstrated** a substantial need for the memorandum or that it could not obtain the substantial equivalent of the information by other means. ... The work product rule applies and exempts the memorandum from disclosure.

*Id.* at 234-35 (emphasis added).

These four cases represent the totality of Washington decisions on these points and uniformly reject the Coalition's newly-raised arguments.

Manifestly, the principles of Civil Rule 26(b)(4) are directly incorporated by RCW 42.17.310(1)(j) for purposes of determining whether work product protection can be overridden in the context of the PDA. *See, particularly, Limstrom, supra*, 136 Wn.2d at 605; *Dawson v. Daly*, 120 Wn.2d 782, 789-90, 845 P.2d 995 (1993). Under that Rule, Cowles here had the burden below to affirmatively prove that it has a substantial need for the information contained in the documents at issue; that the reason for its claimed need is to support a litigation case (not a newspaper article); and that it is unable, without undue hardship, to obtain substantially equivalent information through other means. CR 26(b)(4). And Cowles utterly failed in that burden below. Cowles had and has no case to prepare. And Cowles abjectly refused to make any disclosure whatever below to the School District or to the Court of the information it already possesses concerning the circumstances

Finally and regardless, the District here would gladly accept the Coalition's mistaken invitation to have this Court engage in hypothetical speculation as to whether the disputed documents would have been discoverable by the Walters had their claims not settled and instead proceeded to litigation. Under that legally unsustainable inquiry, the plain fact is that the Walters' counsel could have compelled deposition testimony from each person the School District's attorneys and their investigator interviewed. The Coalition's response to that obvious point is to speculate that the mere passage of time between those persons' giving of those interviews and the time of their

depositions would necessarily render the depositions inadequate to produce information substantially equivalent to that which the Coalition thinks is in the interview notes. Additionally, the Coalition speculates, interview notes of the School District's attorney and their investigator might have been "needed" by the Walters' counsel for potential impeachment usage at trial.

The Coalition ignores that in the seminal Washington work product case of *Heidebrink v. Moriwaki*, 104 Wash.2d 392, 706 P.2d 212 (1985), our Supreme Court expressly considered and rejected the line of authority (such as the sole case cited by the Coalition, out of West Virginia,) holding that the mere passage of time between a relatively immediate post-incident interview of a person and his or her later deposition is sufficient to establish that the deposition cannot not produce information substantially equivalent to that given in the interview. And further in *Heidebrink*, the Court expressly rejected the notion that a purported need for a work product document for potential impeachment purposes is sufficient to sustain the requisite substantial need elements.

At issue in *Heidebrink*, an automobile accident personal injury case, was the transcript of a recorded statement the defendant had given to a representative of his liability insurer concerning the facts of the accident two days after it occurred. The Court initially found the document was within the work product doctrine, and proceeded as follows:

... The question then remains whether respondents have shown substantial need.

Most courts agree that the determination of this issue is vested in the sound discretion of the trial judge, who should look at the facts and circumstances of each case in arriving at an ultimate conclusion. We likewise agree that the determination of this issue is vested within the sound discretion of the trial judge. However, because this is a case of first impression, it is imperative that we look to other cases for standards to guide the trial judge in making this determination.

Cases interpreting Fed.R.Civ.P. 26(b)(3) have generally held that to justify disclosure, a party must show the importance of the information to the preparation of his case and the difficulty the party will face in obtaining substantially equivalent information from other sources if production is denied. The clearest case for ordering production is when crucial information is in the exclusive control of the opposing party. On the other hand, cases interpreting the federal rule indicate that the substantial need standard is not met if the discovering party merely wants to be sure nothing has been overlooked or hopes to unearth damaging admissions. In addition, although several courts have held that statements contemporaneous with the occurrence may in some instances be unique and cannot be duplicated by later interviews or depositions, in general there is no justification for discovery of the statement of a person contained in work product materials when the person is available for deposition. Whether a statement is contemporaneous and unique is a question of fact.

In light of all these considerations, we are unable to see any error in the trial court's determination that respondents did not have "substantial need" of petitioner's statement. Although the statement was taken two days after the accident, the **passage of time alone is insufficient to allow discovery. Respondents have failed to show any other extenuating circumstances justifying disclosure. Hence, the passage of time in the instant case fails to carry the day.** Rather, the more important fact is that the statement in question is that of the defendant. **He is not unavailable; in fact, it was in his deposition that the conflict arose. There is no claim that he has no present recollection of the events in question. The primary reason for acquiring the statement, as we see it, is impeachment. If the possibility of**

**impeachment alone were sufficient to show substantial need, the work product immunity rule, CR 26(b)(3), would be meaningless as any effort at discovery would be said to have a possible impeachment purpose.** Hence, we hold that in the instant case respondents have failed to show a substantial need for the statement ...

*Id.* at 401 (citations omitted; emphasis added).

Thus in the speculative setting the Coalition (wrongly) urges be analyzed here, *Heidebrink* specifically would control to squarely reject any speculative conclusion that the Walters could have established the requisite elements of substantial need to override work product here.<sup>2</sup>

## **II. It Is the Very Nature of RCW 42.17.310(1)(j) That Facts Contained In the Documents Are Protected.**

The Coalition appears to offer a suggestion similar to one Cowles has previously made, to the effect that the trial court should have ordered the District to redact information in the disputed records such that ‘merely factual’ information, only, be disclosed. The argument demonstrates, respect-

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<sup>2</sup> Moreover, it is worth emphasizing here in the “substantial need” context that the Coalition is mistaken in characterizing the disputed documents here as party or witness “statements.” In fact, none of the documents – save for the two sets of notes that Mary Patterson (the mother/volunteer chaperone on the field trip prepared for counsel, Document Nos. 3 and 74 to the *In Camera* submission) – is or purports to be in the words of a party or witness, or anything close to a verbatim account of the interview.

This fact makes the Walters’ hypothetical “need” for the interview notes lesser than even the need of the plaintiff that was deemed insufficient as a matter of law in *Heidebrink*. Interviews notes like those at issue here – as opposed to the recorded statement transcript in *Heidebrink* – could not be reasonably characterized as a clear, full, accurate account of what the witness told Mr. Manix or Mr. Clay here, or the investigator, Mr. Prescott, who interviewed witnesses at their request. At best the notes reflect snippets of what was said, as they are limited by the speed with which the interviewer might be able to write and, more importantly, by what the interviewer, in his mind, thought important. They are thus necessarily much less complete, and would have been of much lesser value to the Walters, than a recorded statement of the type at issue in *Heidebrink*.

fully, a gross misunderstanding of the attorney-client privilege as to notes an attorney or his representative prepare when interviewing the attorney's clients, and as to the work product doctrine with regard to those same client interview notes, as well as to notes of interviews with non-client witnesses.

First, insofar as the attorney-client privilege is concerned, documents tending to disclose the content of verbal communications between an attorney and client related to the subject matter of the legal representation are, quite simply, absolutely protected. *E.g.*, *Limstrom, supra*, 136 Wn.2d at 611-612 (“The notes or memoranda prepared by the attorney from oral communications are **absolutely protected**...”); *Holloway v. Pappas*, 114 Wash.2d 198, 203, 787 P.2d 30 (1990) (attorney-client privilege protects “communications... between an attorney and client **and extends to documents which contain a privileged communication**”) (emphasis added), *citing Kammerer v. Western Gear Corp.*, 27 Wash. App. 512, 517-18, 618 P.2d 1330 (1980), *aff'd*, 96 Wash.2d 416, 635 P.2d 708 (1981). The privilege attaches to the document itself, and Cowles and the Coalition have cited no Washington authority nor any authority from any other jurisdiction to support the parsing of an attorney-client privileged document based on a distinction between factual and “non-factual” content.<sup>3</sup>

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<sup>3</sup> Of course in litigation, a party cannot “hide” facts relevant to the issues in the case on the basis that he learned them from his or her attorney, or that he or she happened to communicate them to the attorney in the course of a privileged discussion. Those facts must absolutely be disclosed by the party in response to appropriate interrogatories or

Here very simply, the interview notes of communications between Mr. Manix or Mr. Clay and: (1) the speaking agents of the District (Dr. Livingston and Dr. Anderson); and (2) their individual clients (Ladd Smith, Heidi Dullanty, Mary Patterson, Kathe Reed-McKay, Lonnah Heimstrah, and Linda Bordwell), the employees and agents of the District upon whose alleged fault the District's claimed *respondeat superior* liability would have been based, are absolutely protected by the attorney-client privilege. So too are Ms. Patterson's written communications with them.<sup>4</sup>

Further, as to work product, numerous authorities establish that the doctrine extends to protect the entire document from disclosure, regardless of whether it contains factual information when the requester cannot make a showing of the requisite substantial need elements. *Limstrom*, 136 Wash.2d at 606-07 (“[T]he civil rule, CR 26(b)(4), which is based on the common law work product protection, includes within the definition of work product **fac-**

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deposition questions. But the fact remains that privileged documents between the attorney and client, that happen to contain those same facts, are protected.

<sup>4</sup> The Coalition's reference to these District employees and volunteers as not being “direct clients” of the attorneys,” Coalition Brief at 8, is bewildering under the indisputable record of this case. That an attorney-client privilege existed between Mr. Manix and Mr. Clay and each of them, individually, was manifestly and painstakingly established, without any contravention, in the record. And the Coalition's suggestion that these persons spoke with Mr. Manix and/or Mr. Clay “not as a lawyer” but as something akin to a ‘friend or a business adviser or banker, or negotiator, accountant, scrivener, or attesting witness,’ Coalition Brief at 9, is, with all due respect, preposterous under the record of this case. These people feared the specter of extremely significant individual liability for their roles in Nathan's tragic death. They needed legal representation. They each testified that the very reason they agreed to speak with Mr. Manix and Mr. Clay with full candor concerning the incident was that they were relying upon assurances that were first given that those lawyers were acting not only as the School District's counsel, but as their attorneys, individually, protecting their legal interests, individually, and that the content of their conversations would be protected by the attorney-client privilege. CP 455, 512-14, 530-31, 533-34, 544-45, 548-49, 454-55.

**tual information** which is collected or gathered by an attorney, as well as the attorney's legal research, theories, opinions and conclusions”) (emphasis added), *citing Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947); *see also Kleven, supra*, 112 Wash. App. at 24; *Limstrom v. Landenburg*, 110 Wash App. 133, 144, 39 P.2d 351 (2002); *see also Lindaman v. Kelso School District No. 458*, 127 Wash.App. 526, 541, 111 P.3d 1235 (2005) (if redaction of a document would allow no meaningful information to remain, there is no need for redaction and then production under RCW 42.17.310(2)).

**III. The School District Proved Each Document Is Within the Controversy Exemption; Individual Findings As to Each Document Was Unnecessary Because Review is De Novo.**

The trial court found that each of the documents at issue was exempted by RCW 42.17.310(1)(j). CP 760; 765. The Coalition argues the ruling is defective because the School District and the trial court purportedly did not provide a document-by-document listing specifying each individual document's protected basis as being in the work product doctrine, the attorney-client privilege, or both.

Cowles has never made this argument. It thus should not be acknowledged by this Court, as it was raised for the first time by amicus. *Citizens for Resp. Wildlife Mgmt., supra*; *Long, supra*. Moreover, the argument pretends the School District and the trial court had a burden that simply does not exist in Washington. The School District's burden under the PDA was to

prove that the disputed documents fit within one of the statutorily-listed exemptions to disclosure set forth by the legislature at RCW 42.17.310(1). *E.g.*, RCW 42.17.340(1) (“The burden of proof shall be on the agency to establish that refusal to permit public inspection or copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.”). This the School District did – in spades – by establishing with overwhelming evidence that every one of the documents at issue, individually, was a work product document and therefore would not have been “available to another party under the rules of pre-trial discovery for causes pending in the superior courts,” RCW 42.17.310(1)(j). And, the District proved, cumulatively, that some of those same documents were additionally within that same statutory exemption as they also fell within the attorney-client privilege.<sup>5</sup>

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<sup>5</sup> The District painstakingly proved to the trial court the individual documents within the entire set that had attorney-client privilege protection, in addition to work product protection, were (1) written liability and damages evaluation reports to by Mr. Manix to the District’s liability insurance representatives (Dr. Anderson, the District’s chief legal officer, was copied on some but not all of those); (2) the notes of discussion between Mr. Manix and/or Mr. Clay on the one hand, and, on the other hand, Dr. Livingston, Dr. Anderson, Mr. Smith, Ms. Patterson, Ms. Dullanty, Ms. Reed-McKay, Ms. Heimstrah, and Ms. Bordwell; and (3) Ms. Patterson’s handwritten notes prepared by counsel. These documents were described in an index provided to Cowles informally after the PDA request was received, *see* CP 411-425 and Appendix A to the School District’s Brief on Appeal. They further were categorized in detail at the trial court level, CP 348-51.

The District additionally made clear to Cowles and the trial court that it claimed a fourth category of documents was protected not only by the work product doctrine, but by attorney-client privilege as well. Those documents are the notes made by David Prescott, Mr. Manix’s and Mr. Clay’s investigator, of his conversations with Mr. Smith, Ms. Patterson, Ms. Dullanty, Ms. Reed-McKay, Ms. Heimstrah, and Ms. Bordwell. However, the School District made clear to Cowles and to the trial court, as it has to this Court, that it believes that reaching the issue of the applicability of the attorney-client privilege would

Further, with regard to the alleged absence of “findings” by the trial court, this Court’s review on this appeal is *de novo*. *Hangartner v. City of Seattle*, 151 Wash.2d 439, 448, 90 P.3d 26 (2004). This Court stands in the same position as the trial court. *O’Connor v. Dept. of Social & Health Svcs.*, 143 Wash.2d 895, 910, 25 P.3d 426 (2001). Manifestly, the Coalition cannot complain on appeal that the trial court failed to enter findings that would have no relevance whatever to the appellate court’s review.

**IV. The Coalition’s Argument That Mr. Manix, Mr. Clay, and Their Investigator, Mr. Prescott, Were Performing An “Ordinary Course Review” for the District’s Safety Office Has No Support In the Evidence.**

The uncontradicted facts of record in this case provide no support for a fiction that the investigation conducted here by Mr. Manix, Mr. Clay, and, at their direction, Mr. Prescott, was nothing more than a “routine ordinary course internal investigation” for the School District’s Safety Office.. What the facts instead support, **overwhelmingly**, is that their work was done directly and solely in anticipation of litigation, and if ever there were a classic work product investigation, this was it.

At the time of the incident involving Nathan, the School District’s Safety Office certainly did have procedures, sitting in a notebook on a shelf in the Safety Office, facially requiring District Safety Office employees to fill out certain forms in the event of a student injury. However, in this instance, **not one single step or aspect of those procedures** was implemented

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be superfluous because of the dispositive protection afforded those documents by the work product doctrine.

or followed (not uniquely, as the record establishes those procedures were rarely if ever followed in cases of student injuries). What **did** happen here was that literally within minutes of a student's death, the District's superintendent, its chief legal officer, and its attorneys immediately and accurately anticipated the near certainty of a very substantial wrongful death claim and began working assiduously – and for no other purpose – than defense against such a claim. Should Cowles and the Coalition wish to criticize the District for never initiating its internal procedures by assigning employees to complete the Safety Office's "required" forms and activities, they certainly can do that. But they cannot engage in a factual or legal fiction that the tort defense investigation that was immediately pursued here, in this very unique case under a mountain of uncontested facts, was something it was not.<sup>6</sup>

**VI. The Coalition's Argument That the District Must Make A Showings Beyond the Applicability of RCW 42.17.310(1)(j) is Newly-Raised and Should Not Be Considered; Moreover Such A Showing Is Not Required;**

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<sup>6</sup> Washington's standard for determining whether a document that was prepared in an investigation is work product is "... whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Heidebrink v. Moriwaki*, 38 Wash. App. 388, 396, 685 P.2d 1109 (1984) (citations omitted). The court's goal under the single case cited by the Coalition, *Collins v. Mullins*, 170 F.R.D. 132, 135 (W.D VA. 1996), is to decipher whether the "driving force behind preparation of the documents" was compliance with routine ordinary business procedures or instead defense against anticipated litigation.

Here, under the overwhelming record of evidence below, it can only be "fairly said" that the "driving force" – indeed, the **only** force – behind the investigation conducted by Mr. Manix, Mr. Clay, and, at their direction, Mr. Prescott, was to defend the District against an initially-anticipated, and very shortly thereafter actual, very substantial wrongful death claim. Only some of the figurative mountain of facts demonstrating that there can be, respectfully, no intellectually honest dispute as to this conclusion were summarized in the District's Opening Brief so will not be repeated here.

**Moreover, the District Overwhelmingly Incidentally Made that Showing.**

The Coalition offers yet another amicus argument that has never been made by Cowles – that the District had a burden not only to prove the applicability of the PDA’s controversy exemption at RCW 42.17.310(1)(j), but that disclosure: (1) is clearly not in the public interest; and (2) would result in substantial and irreparable harm to a vital governmental function.

This is another amicus argument not previously made by Cowles, and as such should not be addressed by this Court. *E.g., Citizens for Resp. Wildlife Mgmt., supra; Long, supra.* And regardless, the contention lacks substantive merit. Whereas the statute the Coalition cites for its proposition, RCW 42.17.330, does mention public interest and harm to persons or vital governmental functions, our courts have held that that statute is a limited procedural provision that merely authorizes the type of PDA declaratory judgment actions that the School District and Nathan’s parents here employed when they filed this case; the statute imposes no substantive rights or burdens different than those elsewhere stated in the provisions of the PDA. *Progressive Animal Welfare Society v. University of Washington*, 125 Wash.2d 243, 257-58, 884 P.2d 592 (1995) (“RCW 42.17.330 is simply an injunction statute. It is a *procedural* provision which allows a superior court to enjoin the release of *specific* public records **if they fall within specific exemptions found elsewhere in the Act.** Stated another way, section .330

**governs access to a remedy, not the substantive basis for that remedy.**”)

(citations omitted; emphasis by italics in original; emphasis in bold and underscoring added).<sup>7</sup>

And furthermore and regardless, the Coalition cannot seriously dispute that in today’s litigious society, a public agency’s entitlement to rely upon the work product doctrine and the attorney-client privilege, to the same extent as claimants and litigants who are adverse to the agency and who themselves enjoy those protections, is critical if the agency is to discharge its mission of protecting the public’s interests and that evisceration of those protections would severely damage the vital functions our public servants perform. *See e.g., Port of Seattle v. Rio*, 16 Wash. App. 718, 725, 559 P.2d 18 (1977); *Limstrom, supra*, 136 Wash.2d at 609-612; *see also O’Connor v. Dept. of Social & Health Svcs., supra*, 143 Wash.2d at 910 (holding that a litigant adverse to a governmental agency may obtain documents from the agency not only pursuant to requests for production under Civil Rule 34, but additionally via the independent substantive authority of the Public Records Act). It would be simply devastating to a public agency of this state – and most certainly not in the interests of the public that it solely exists to serve – if a prospective or actual adverse litigation could, with a one-sentence PDA

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<sup>7</sup> Indeed, no Washington court upholding a public agency’s reliance on the controversy exemption of RCW 42.17.310(j) has imposed on that agency any burden beyond proving that the withheld document is work product or attorney-client privileged material. *See Limstrom, supra, Kleven, supra, Overlake Fund, supra, Harris, supra.*

request and for the cost of a postage stamp, require the agency to disclose its most intimate work product and attorney-client privileged materials.

**VII. The Filing of This Declaratory Judgment Action Was Procedurally Proper; and Regardless, Cowles Did Employ the Procedure That the Coalition Wrongly Contends Was Solely Proper.**

Finally, the Coalition makes a procedural argument – that the Declaratory Judgment Action brought by Nathan Walters’ parents, his Estate, and the School District here, was not authorized by law. The Coalition contends the only proper resolution of the issues at hand was for the District to deny Cowles’ PDA request, and wait to be sued under RCW 42.17.340(1).

The Coalition is, respectfully, flatly incorrect. RCW 42.17.330(1) could not be more plain in expressly authorizing the action that the Walters and the School District took here:

The examination of any specific public record may be enjoined if, **upon motion and affidavit by an agency or its representative or a person ... to whom the record pertains**, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital government functions.

(Emphasis added.)

Moreover, there was full compliance below, also, with the procedural mechanism that the Coalition (incorrectly) suggests was solely proper – that under RCW 42.17.340(1). That statute provides in pertinent part:

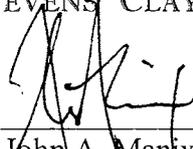
**Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior**

court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

RCW 42.17.340(1) (emphasis added). This precisely occurred below. “Upon motion” by Cowles, “having been denied an opportunity to inspect or copy a public record” by the School District, the “superior court... require[d] the responsible agency to show cause why it ha[d] refused to allow inspection or copying” of the records. Upon that show cause appearance, the trial court appropriately assigned the School District the burden of proving that the records fell within a statutory exemption to the PDA, i.e., the controversy objection of RCW 42.17.310(1)(j), and the trial court proceeded to find, based on an overwhelmingly compelling record, that the District had satisfied that show cause burden.

Respectfully submitted this 6<sup>th</sup> day of December, 2005.

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