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No. 231364

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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, deceased minor child; and SPOKANE SCHOOL DISTRICT NO. 81, a Washington municipal corporation,

Respondents.

v.

COWLES PUBLISHING COMPANY, a Washington corporation,

Appellant,

APPEAL FROM SPOKANE COUNTY SUPERIOR COURT

THE HONORABLE JEROME LEVEQUE

BRIEF OF APPELLANT COWLES PUBLISHING COMPANY

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A. ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred in entering the Order of June 4, 2004, granting plaintiff-appellee Spokane School District No. 81's Motion for Summary Judgment and denying defendant-appellant Cowles Publishing Company's request for access to public records compiled on behalf of the District concerning the 2001 death of a Spokane School District student.

Issues Pertaining to Assignment of Error

On May 18, 2001, Nathan Walters, a ten-year-old student at Logan Elementary School in Spokane School District No. 81 (hereinafter "the District"), died after tasting a peanut butter cookie while on a field trip with his grade school to the Greenbluff area near Mt. Spokane. Nathan suffered from a peanut allergy. Upon learning of Nathan's death, District Associate Superintendent Mark Anderson immediately contacted the District's regular law firm of Winston, Stevens, Clay & Manix and turned over to the firm (and later to a private investigator, David Prescott of Professional Investigations and Consulting, LTD) the District's entire investigation into the events of May 18. Though Dr. Anderson's office had overall responsibility for reviewing the incident and the District has detailed administrative procedures to be followed in the event of injury to

a student, the District's investigation into the events of May 18, including the witness interviews and documentation of the incident required under the District's administrative procedures, was conducted by a private investigator and the law firm. All records of the investigation have been maintained by the law firm.

Defendant-appellant Cowles Publishing Company, publisher of *The Spokesman-Review* (hereinafter "*The Spokesman-Review*") filed a public records request, pursuant to Chapter 42.17 RCW (the Public Disclosure Act), seeking records related to the incident. The District filed the instant suit against *The Spokesman-Review*, seeking a declaratory judgment that the District need not disclose the requested records. The District has refused to produce hundreds of pages of records responsive to *The Spokesman-Review's* request, including documents and notes prepared by District employees, notes written by a field trip chaperone, the private investigator's notes of interviews with witnesses, photographs taken by the investigator, a map drawn by the investigator, and notes of counsel for the District of discussions with the investigator describing the investigator's interviews of witnesses or District employees. The trial court granted the District's motion for summary judgment and found that, under

RCW 42.17.310(1)(j), the attorney-client privilege and work product doctrine exempt the requested documents from disclosure.

1. Is the public policy favoring broad access to public records under the Public Disclosure Act bypassed when a school district designates a private investigator and legal counsel as the sole parties responsible for assembling and maintaining all records pertaining to the death of a student on a school field trip?

2. Are documents created by a public agency's private investigator and legal counsel in order to fulfill the agency's administrative procedures attorney work product?

3. Assuming that the requested documents constitute attorney work product under the Public Disclosure Act, does the Public Disclosure Act prevent disclosure of attorney work product when litigation over the incident to which the records relate is foreclosed as a possibility and the public has no reasonable alternative route to obtain the public records in question?

4. Does the attorney-client privilege statute, RCW 5.60.060, which prevents an attorney from disclosing confidential communications without the client's consent, constitute a statute "which exempts or prohibits disclosure of specific information or records" so as to bring

attorney-client privileged communications within the purview of documents exempted from disclosure pursuant to the Public Disclosure Act?

5. Does the attorney-client privilege protect documents that are created by a private investigator and legal counsel and never transmitted to the public agency from disclosure pursuant to the Public Disclosure Act?

6. Assuming that the requested documents constitute attorney work product or material subject to the attorney-client privilege under the Public Disclosure Act, does a public agency's selected disclosure of facts discovered in investigation conducted by a private investigator and legal counsel waive work product and/or attorney-client privilege protection and render the entire universe of facts discovered in the investigation subject to disclosure?

B. STATEMENT OF THE CASE

On May 18, 2001, Nathan Walters, a public school student of the District, died after tasting a peanut butter cookie while on a field trip sponsored by his school. C.P. 306. Nathan suffered from a peanut allergy. *Id.* That afternoon, District Associate Superintendent Mark Anderson was informed of the incident. C.P. 157. Dr. Anderson immediately contact the law firm of Winston, Stevens, Clay & Manix and

turned over to the firm (and later to a private investigator, David Prescott of Professional Investigations and Consulting, LTD) the District's entire investigation into the death of Nathan Walters. C.P. 190-91.

1. The Investigation Required In The Event Of Injury To A Student By The District's Administrative Procedures Was Conducted Entirely By The Private Investigator And Law Firm.

In 2001, the District had detailed administrative procedures to be followed in the event of injury to a student. *See* C.P. 249 – 253. These procedures required the following written documentation: (1) a written report by a site manager or designee at a particular school filed within twenty-four hours of the injury; (2) an "Injury or Occupational Illness Report Form" to be completed by a District site manager or designee, which required information concerning the type of injury, who provided first aid, whether medical treatment was required, and what caused the injury or illness; (3) a "Statement by Witness, Injured and/or Ill Person"; (4) a "Field Trip Emergency Report," which required a teacher, coach or bus driver on a field trip to "document all events, noting time, date, severity of injuries, names of injured persons, witnesses and emergency personnel" and to "[p]rovide a written report to the School District as soon

as possible"; and (5) an incident report form pursuant to the "Medical Emergency Procedure." *Id.*

Of these procedures, District personnel only completed an incident report form, and the information contained in the report, by the District's own admission, is minimal. C.P. 178. However, the private investigator and law firm hired by the District completed investigation sufficient to comply with the District's procedures. The private investigator and the law firm have compiled and maintained records regarding the incident, including documents and notes prepared by District employees, notes written by a field trip chaperone, notes of interviews with twenty-seven witnesses and other persons, photographs taken by the investigator, a map drawn by the investigator, and notes of counsel for the District of discussions with the investigator describing the investigator's interviews of witnesses or District employees. C.P. 223-237. Stated differently, the District's entire administrative investigation into the events of May 18, including the witness interviews and documentation of the incident required under the District's administrative procedures, was conducted by a private investigator and the law firm.

2. The Records Assembled By The Private Investigator And Law Firm In The Course Of The Investigation Were Never Provided To The District.

The District admits that all records of the investigation have been maintained by the law firm. C.P. 207. The District has no documents in its files reflecting interviews with persons on the field trip or any other witness statements. *Id.*

3. The District Released Information Obtained Through The Investigation Conducted By The Private Investigator To The Public And To The Walters Family.

Since the incident, the District released to the public information obtained from the investigation conducted by the private investigator and law firm. See C.P. 309-312. On May 22, 2001, Spokane Public Schools Superintendent Gary Livingston held a press conference about the circumstances of Nathan Walters' death. *Id.* He stated to the media that the District had decided to hire a private investigator to investigate Nathan's death on behalf of the District "because of the serious nature of this case...We wanted to make sure it was objective and wanted to have someone with experience." *Id.* In addition, Superintendent Livingston disclosed the following facts: (1) the District and Nathan's parents had communicated about Nathan's allergies, including his allergy to peanuts, upon Nathan's transfer to Logan Elementary in spring 2001; (2) when Nathan went on the field trip, "the District followed its standard procedure

of making sure that Nathan's asthma inhaler and an Epi-pen [a shot used to counteract an allergic reaction] were taken along..."; (3) two third grade classes went on the field trip, and a sack lunch request was made for the students to the District's food services staff by one of the third grade teachers; (4) "[i]t appears at this time that no special lunch request was made by the school staff for Nathan"; (5) Nathan reported not feeling well after lunch and "in light of his exposure to peanut products, the teacher made telephone contact with Nathan's home"; (6) a parent chaperone who is also a licensed practical nurse assisted in describing his condition to the person at Nathan's home; (7) on the bus, Nathan was with the chaperone who is a nurse and used his inhaler; (8) Nathan had a previously-scheduled doctor's appointment, and "[i]t was eventually requested that someone from the field trip drive Nathan home"; (9) a chaperone agreed to drive Nathan home, and left with Nathan and the chaperone who is a nurse; (10) on the way home, "Nathan's condition worsened," he used his inhaler again, and the chaperones stopped at a fire station; (11) there were no emergency medical personnel at the fire station at the time, but 9-1-1 was called and emergency medical personnel came to the fire station; (12) prior to the arrival of the emergency medical personnel, the nurse gave Nathan an Epi-pen shot; and (13) Nathan was eventually transported to

Holy Family Hospital by the emergency medical personnel, where he died. C.P. 309-310. Within days of the press conference, Superintendent Livingston resigned from his position as Superintendent of the District to take a new position in Olympia. C.P. 210-11. Since that time, the District has communicated with the public about the incident only through its law firm. *Id.*; C.P. 303-305.

On August 13, 2001, a reporter for *The Spokesman-Review* filed a public records request with the District. C.P. 322.¹ Approximately one week after the public records request was made, the District and the family of Nathan Walters entered into a settlement agreement. C.P. 219-222. While the terms of the settlement agreement were not released, the Walters family and the District provided to the public a “joint press release.” C.P. 323-324. The joint press release states that “through the course of each parties’ investigation, it became apparent that the information that had been gathered concerning the circumstances leading to Nathan’s death produced differing and inconsistent versions. Further, it was determined that initial reports of the incident may have been

¹The request also sought access to records of an accident involving another student, Cody Soter. *See* C.P. 1-19. That request was resolved as part of this litigation, and a settlement agreement between District 81 and Cody Soter has been released to *The Spokesman-Review*.

inaccurate or incomplete in many respects." *Id.* Associate Superintendent Anderson testified that the reference to inaccurate or incomplete reports pertains to reports in the media. C.P. 205.

4. After *The Spokesman-Review* Filed A Public Records Request, The District Brought This Lawsuit Against *The Spokesman-Review* For Injunctive And Declaratory Relief Seeking A Determination That All Of The Records Assembled By The Private Investigator And Law Firm Are Exempt From Disclosure Under The Public Disclosure Act.

In October 2001, the District, in conjunction with representatives of Cody Soter and the parents of Nathan Walters, initiated an action in Superior Court against *The Spokesman-Review* seeking to permanently enjoin release of all District records pertaining to the Cody Soter and Nathan Walters investigations.² The Soter portion of the lawsuit has been resolved, and the Soter representatives have withdrawn from the suit. In April 2002, counsel for the Walters withdrew from the case, and in May of 2002, Rick Walters, Nathan's father, was voluntarily dismissed as a plaintiff in this action. C.P. 20-25.

² The documents requested by *The Spokesman-Review* were numbered 1 through 75 and described for identification in a chart entitled Index to Walters Settlement and Incident Investigation Records Requested by Spokesman. C.P. 223-237. Through the course of this litigation, the trial court ordered release of Document Nos. 1 and 2, the Settlement Agreement between the District and the Walters family and the incident report. C.P. 137-138; C.P. 761-767.

On May 30, 2003, the trial court entered an Order releasing for public review the settlement agreement between District 81 and the Walters family. C.P. 137-138. The agreement shows that the School District, through an insurance company, paid out \$985,000 as a result of Nathan Walters' death. C.P. 219-222.

On March 10, 2004, *The Spokesman-Review* filed a Motion for Order to Show Cause and Request For In-Camera Review. See C.P. 34-35. The trial court issued an Order to Show Cause on March 12, 2004. C.P. 36-37. On March 17, 2004, the District filed a Motion for Summary Judgment. C.P. 337-351.

The trial court heard argument from counsel for *The Spokesman-Review* and counsel for the District on April 16, 2004. C.P. 761-767. The trial court also examined *in camera* the documents in question and reviewed various pleadings and evidentiary affidavits submitted by the parties. *Id.* On June 10, 2004, the trial court entered an Order granting the District's Motion. *Id.* The court found that the documents in question are "each protected by the attorney-client privilege, or by the work product doctrine, or by both" and that RCW 42.17.310(1)(j) exempts the requested documents from disclosure. C.P. 765. Further, the court found that the District did not waive the protections of the attorney-client privilege or

work product doctrine. *Id.* The only document the court ordered the District to produce was Document No. 2, the incident report generated by a District employee according to the District's administrative procedures. *Id.*; *see also* C.P. 223.

The Spokesman-Review timely filed a Notice of Appeal on June 25, 2004. C.P. 768-777.

C. SUMMARY OF ARGUMENT

The policy of the Public Disclosure Act strongly favors disclosure of public records. Exemptions to disclosure are to be narrowly construed, and the burden rests upon the public agency to defend its refusal to disclose a record. Contrary to this policy, the District, by filing a lawsuit seeking injunctive and declaratory relief against *The Spokesman-Review* and by repeatedly referencing *The Spokesman-Review's* status as a member of the media, has attempted to put the burden on *The Spokesman-Review* to justify its request. This is a misuse of the Public Disclosure Act and undermines its policy of allowing citizens access to public records.

The crux of this case is whether the District may bypass the Public Disclosure Act's policy favoring disclosure by designating a private investigator and legal counsel as the sole parties responsible for assembling and maintaining all records pertaining to a specific incident,

such as, in this case, the death of a public school student on a school-sponsored field trip. The District has made a blanket claim that all documents relating to the death of Nathan Walters are subject to protection under either the attorney-client privilege or work product doctrine. However, the District, by its own procedures, is administratively required to conduct an investigation where, as here, a student is injured. The policy of the Public Disclosure Act is contravened by the District's delegation of all responsibility for its investigation to its counsel and private investigator, and subsequent claim that all records created through that delegated investigation are work product or privileged.

Moreover, the records at issue are not work product because they are administrative in nature. The work product doctrine does not protect documents that would have been created even without the concurrent litigation. In addition, assuming that the records constitute work product, the work product doctrine does not provide an absolute protection from disclosure. Where, as here, the party seeking disclosure has no other reasonable avenue to obtain information necessary for that party to discover, the work product doctrine yields.

In addition, the attorney-client privilege statute, RCW 5.60.60(2)(a), should not be construed as a statute exempting disclosure of

information or records under the Public Records Act. However, even if the attorney-client statute provides an exemption, the privilege does not protect documents created by legal counsel and never communicated to the public agency client. The District has made no showing that any of the documents were confidential communications to it from counsel so as to bring the documents within the protection of attorney-client privilege.

Finally, assuming that the requested records are protected by either the work product doctrine or the attorney-client privilege, the District waived those protections by disclosing information gathered by its legal counsel and private investigator to the public and to the Walters family.

D. ARGUMENT

1. The District's Refusal To Disclose Its Investigatory Records And Lawsuit To Enjoin Their Production Contravene The Policy Of The Public Disclosure Act.

- a. The Public Disclosure Act Strongly Favors Disclosure Of Public Records And Puts The Burden On The Public Agency To Prove That A Document Is Exempt From Disclosure.

The Public Disclosure Act, RCW 42.17, is to be construed liberally in favor of access, and its exemptions from mandatory disclosure are to be construed narrowly. RCW 42.17.251. The Act explicitly states that public agencies do not have "the right to decide what is good for the

people to know and what is not good for them to know. *Id.*; see also *PAWS v. University of Washington*, 125 Wn.2d 243, 880 P.2d 592 (1994); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The Act requires a court reviewing a request for public records to "take into account the policy...that free and open examination of the public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others..." RCW 42.17.340(3).

To enforce this policy, the Public Disclosure Act provides a mechanism for judicial review of an agency's determination that records should not be disclosed. Upon motion of the party denied access, the agency may be required to show cause why it has refused to allow the requested access. RCW 42.17.340(1). "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 and records." RCW 42.17.340(1).

- b. The District, At Every Opportunity, Has Attempted To Force *The Spokesman-Review* To Defend The Propriety Of Its Request, Rather Than Accepting Its Burden To Justify Its Refusal To Disclose Documents.

The instant case arises via a different procedural route than that contemplated by the Public Disclosure Act. Under the Public Disclosure Act, an agency, upon receipt of a request for release of public records, must determine within the allotted time period whether any statutory exemption precludes release of the requested records. RCW 42.17.320. The agency must then inform the requesting citizen of its decision and, if the decision is non-disclosure, the requesting party then determines whether to seek judicial review of the agency's decision. RCW 42.17.340.

Contrary to this procedure, the District filed suit against *The Spokesman-Review*, seeking a declaratory judgment and injunctive relief prohibiting release of the requested records. Thus, *The Spokesman-Review* was required to appear and defend a lawsuit that sought injunctive and declaratory relief against it. A request for injunctive relief under the Public Disclosure Act is available only after a public agency has made a decision to release a record and a private party or other agency seeks to block the release. *See* RCW 42.17.330. Here, the District sought to block release of its own records. This use of the Public Disclosure Act to force a member of the public to come into court, at that party's expense, and defend itself as to why records should be made public inappropriately wields the Public Disclosure Act as a sword to prevent access rather than

as intended, as a potential shield to protect statutorily-exempt records under the required procedure of a show cause motion. Though the trial court found that the District's procedural route was not a fatal error due to *The Spokesman-Review's* show cause motion and the parties' agreement in oral argument that the parties' substantive arguments should be resolved on the merits (C.P. 761-767), the District's filing of a lawsuit for injunctive relief runs contrary to the Washington Supreme Court's instruction that the Public Disclosure Act should not be an expensive enterprise for citizens, where defending a lawsuit brought by a public agency certainly adds an expensive level of cost to a simple public records request. *See, e.g., Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990).

In addition, the District has repeatedly attempted to use the identity of the requesting citizen in this case, a newspaper, as a reason why the records should not be disclosed. *See, e.g.,* C.P. 338 (stating that the District must be able to communicate with its counsel and generate work product "without fear that disclosure...[may be] compelled on five days' notice to any citizen (much less to the media...)"); C.P. 609 (arguing *The Spokesman-Review* "seeks this information only to publish a sensational story"); C.P. 612 (claiming *The Spokesman-Review* has no need for the information because it has no pending litigation but instead "has to prepare

(and sell) newspapers"); C.P. 745 (accusing *The Spokesman-Review* of seeking to "publish further articles setting forth the salacious details of Nathan's death"). The law is clear that the identity of the citizen has no bearing on the validity of a request for access to public documents. RCW 42.17.270 ("Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request..."). The District's references to the media as somehow different from any other citizen filing a request for access to public records underscore that the District, instead of defending its broad claim that every single document in its possession related to Nathan Walters' death is work product or protected by attorney-client privilege, seeks to turn the focus on why the requester seeks the material. But public records are just that – public. A public agency is not able to pick and choose which members of the public have access to public records, and the District's focus on the identity of the citizen as justification – legal, ethical or moral – for its refusal to allow access contravenes the letter and spirit of the Public Disclosure Act.

2. The Public Policy Favoring Broad Access To Public Records Is Bypassed When A School District Designates A Private Investigator And Legal Counsel As The Sole Parties Responsible For Assembling And Maintaining All Records Pertaining To A Specific Incident.

The core issue in this case is whether a public agency can escape its statutory requirement to disclose records by designating a private investigator and legal counsel as the sole parties responsible for assembling and maintaining all records pertaining to a specific incident. That is precisely what has occurred here. District officials learned of Nathan Walter's death and immediately transferred all investigatory responsibility to its regularly-retained legal counsel and a private investigator. District personnel did not conduct the investigation, as required under the District's own administrative procedures, but instead relied on the investigator and law firm to complete those tasks, including interviewing witnesses and gathering facts related to the incident. The end result is that virtually no records exist at the District relating to the District's investigation of Nathan Walters' death.

The Spokesman-Review's public records request does not seek any documents evincing the mental impressions, conclusions, opinions or legal theories of counsel for the District, and recognizes that such materials are protected under the work product doctrine. *See, e.g., Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998). However, *The Spokesman-Review* does seek the facts relating to the incident, including the facts assembled by the District concerning the May 18, 2001 field trip

and how food containing peanuts was placed in the lunch given to Nathan Walters.

The records withheld by the District indisputably contain facts. C.P. 213. Indeed, the documents include "handwritten notes of incident events" drafted by a chaperone who assisted in caring for Nathan Walters on the field trip. *See* C.P. 223-237. (Document Nos. 3, 74). Other documents consist of statements drafted by District employees. *Id.* (Document Nos. 57, 66). The District's claim of work product doctrine and attorney-client privilege protection asserted as to these documents, as well as all other records of witness statements, interviews, photographs and maps, leaves the incident (and the actions of District personnel before, during, and after the incident) buried from public view. The public, therefore, not only is left with no access to the records relating to the death of a public school student caused by the lunch given to him on a school field trip, but also, is denied access to the facts supporting the District's decision to authorize a \$985,000.00 payment by its insurance company. Contrary to the policy of the Public Disclosure Act, the District has successfully prevented any informed public examination of this decision merely by attempting to transfer its administrative responsibility to investigate the incident to a private investigator and legal counsel.

As discussed below, the work-product doctrine and attorney-client privilege do not preclude disclosure of the documents in this action. But should the Court affirm the trial court's ruling, public agencies will have a new, judicial exemption to the Public Disclosure Act – the "hired counsel" exemption. Under such a ruling, a public agency will be able to foreclose all public disclosure of records on sensitive issues by simply delegating all responsibility for its procedural or administrative response to retained counsel.

3. Documents Created By The District's Private Investigator To Fulfill The District's Administrative Procedures Are Not Work Product.

- a. Public Records Created Pursuant To An Agency's Administrative Procedures Are Not Work Product, Even If Concurrent Litigation Exists.

Records prepared in the ordinary course of business are not protected by the work-product doctrine. *Escalante v. Sentry Insurance*, 49 Wn. App. 375, 395, 743 P.2d 832 (1987). Though documents compiled in the ordinary course of business might also help in preparation for litigation, records "that would have been created in essentially similar form irrespective of the litigation" are not work product. *U.S. v. Adlman*, 134 F.3d 1194, 1202 (2nd Cir. 1998). Thus, documents generated

pursuant to internal procedures that are coexistent with a present or anticipated lawsuit are not protected:

Not all documents generated from an internal investigation are protected by the work product doctrine 'simply because a Company's internal investigation is coexistent with a present or anticipated lawsuit that is the same subject matter of the litigation.' Therefore, documents created as a result of the discovery opponent's ordinary course of business 'that would have been created irrespective of litigation are not under the protection of the work product doctrine.'

Long v. Anderson University, 204 F.R.D. 129 (S.D. Ind. 2001), quoting *Caremark, Inc. v. Affiliated Computer Services, Inc.*, 195 F.R.D. 610, 614-615 (N.D. Ill. 2000). In *Long*, plaintiff sought production of documents created by the defendant university with advice of counsel in an investigation under its harassment policy. *Id.* at 137. The court found that these documents were not work product and were "an ordinary and customary step" pursuant to the university's procedures of investigating claims of harassment. *Id.* Even though plaintiff's counsel threatened litigation if the claims were not resolved, the work product doctrine did not apply because the documents would have been created in the course of the required investigation regardless of the threat of litigation. *Id.* at 136-137; see also *Collins v. Mullins*, 170 F.R.D. 132, 134-135 (W.D. Va. 1996) (noting that courts "have consistently held" that, despite the

constant possibility of litigation, evidence gathered in internal police investigations of alleged misconduct is discoverable).

Likewise, in *Cowles Publishing Company v. Spokane*, 69 Wn.App. 678, 849 P.2d 1271 (1993), the Spokane Police Department sought the protection of RCW 42.7.310(1)(d) for reports it had assembled concerning police dogs coming into contact with people, arguing that the reports were in the nature of investigative records. *Id.* at 682. Both the trial court and Court of Appeals determined that since the police department was merely complying with internal rules relating to assembling and compiling the records, the exemption under RCW 42.17.310(1)(d) was not applicable to these “administrative” reports.

The mere fact that an agency document was prepared by an attorney does not necessarily qualify the record as work product. *Bristol-Meyers Company v. FTC*, 598 F.2d 18, 28 (D.C. Cir. 1978). Likewise, an attorney's receipt of documents does not confer automatic protection under the work product doctrine. *See In re Detention of Williams*, 106 Wash.App. 85, 22 P.3d 283, *aff'd in part, rev'd in part*, 147 Wash.2d 476, 55 P.3d 597 (2002). In *Williams*, a defendant in a civil commitment proceeding objected to discovery requests related to Social Security records because the documents were gathered by and in the possession of

his attorney. *Id.* Finding that the documents were prepared by the Social Security Administration for reasons other than anticipated litigation, the appellate court further noted that defendant's use of the doctrine contravenes the policy of civil discovery:

Under [this] interpretation of the doctrine, a litigant could shield sensitive documents from discovery simply by giving them to his attorney. The work product doctrine cannot be used to subvert discovery in this manner.

Id. at 100. Thus, the work product doctrine does not operate to protect documents that would have been created regardless of any concurrent pending litigation (or anticipation of pending litigation) or documents whose claim to protection arises solely from the attorney's possession of the documents.

- b. The Public Records Requested by *The Spokesman-Review* Are Not Work Product Because They Were Generated In The Process Of The District's Required Administrative Investigation Into The Death Of A Student.

In 2001, the District had in place a set of administrative procedures to be followed in the event of injury to a student. These procedures include several written forms to be completed as soon as possible to document statements by witnesses to the event (including other students, District employees and chaperones), specifics of the injury and the extent

of any medical attention given. To comply with these procedures, the District necessarily had to interview all witnesses and gather information about the circumstances of the injury. The only written report required by these procedures that was ever generated by District employees is the incident report form concerning the May 18, 2001 field trip, which, as admitted by the District, provides extremely limited information. C.P. 178.³

However, the District, through the private investigator and law firm, did undertake the required investigation. The investigation detailed in the District's procedures, namely, gathering of facts from witnesses and the setting of the incident, was completed almost entirely by the private investigator, David Prescott. The decision to hire Prescott was made by Superintendent Livingston because, given the "serious nature" of the incident, the District "wanted to make sure" the investigation "was objective and wanted to have someone with experience." C.P. 192, 309-312. Prescott created notes of interviews with various witnesses and other persons, including the teachers and chaperones who were present on the

³ The incident report is the only document besides the settlement agreement that the trial court found was not subject to attorney-client privilege or work product doctrine protection. C.P. 761-767.

field trip, registered nurses for the District, administrative personnel at Logan Elementary, the Chief of the Mead Fire Department, and staff at other elementary schools, Beamis and Roosevelt.⁴ C.P. 223-237. In addition, Prescott took photographs of the area where the field trip took place and drew a map of the property. *Id.* (Document Nos. 63-64).

Had Prescott not done these interviews, taken photographs or drawn a map, District employees would have had to do so in order to comply with District procedures – namely, to conduct an investigation as required under the Safety Regulations and Procedures Manual, and the Medical Emergency and Field Trip Emergency protocols, as well as to complete the Injury or Occupational Illness Report form and Statement by Witness and Injured and/or Ill Person forms. C.P. 249-253. Prescott, in lieu of a District employee, gathered the facts necessary to complete the District's administratively-mandated investigation. As such, those assembled facts are not work product created in anticipation of litigation, but administrative records. What the District did in its retention of David Prescott and counsel was no more than what its internal procedures said it should do to assemble facts concerning the Nathan Walters incident, the

⁴ Specifically, Prescott's notes of interviews constitute Document Nos. 6-8, 10, 15, 19, 20, 22, 24, 25, 27, 29, 31-33, 35, 36, 38, 45, 51, 53, 58-62, and 65. C.P. 223-277.

only difference being that the District chose to hire non-District personnel to assemble the same information that the procedures and rules said should be assembled by District personnel.

As established in *Long and Cowles Publishing Company v. Spokane, supra*, it is not permissible or appropriate for the District to be afforded the protection of RCW 42.17.310(1)(j) for what, in essence, are administrative records merely because the records were assembled and are now maintained by non-District personnel. The records would have been created by the District even without anticipated litigation; the District would have had to gather the same facts and interviews to comply with its administrative procedures for documenting events related to an injury to a student. The substantive content of the records does not change because a hired private investigator, rather than a District employee, compiled the statements and facts. To the extent the records at issue contained any specific mental impressions, conclusions, or legal theories of counsel for the District, those portions of the factual reports may be deleted as exempt under RCW 42.17.310(1)(j); but to the extent the records contain factual statements provided by witnesses assembled as part of the District's administrative investigation, such factual statements do not fall under the protection of RCW 42.17.310(1)(j) and should be disclosed.

4. The Public Disclosure Act Does Not Contemplate Exempting Disclosure Of Work Product Where The Possibility Of Litigation Is Foreclosed And There Is No Other Reasonable Avenue For The Public To Obtain Facts Discovered By A Public Agency.

As discussed *supra*, the work product doctrine does not apply to the documents at issue here. However, assuming for the sake of argument that RCW 42.17.310(1)(j) is applicable, the work product doctrine does not operate to exempt documents from disclosure where, as here, the party seeking disclosure has no other reasonable avenue to discover the information.

- a. The Work Product Doctrine Is Not Absolute And Can Be Overcome By A Party's Need For Information That Cannot Reasonably Be Obtained Elsewhere.

RCW 42.17.310(1)(j) exempts from disclosure "public records which are relevant to a controversy and which are the work product of an agency's attorney." *Limstrom*, 136 Wn.2d at 605. Courts look to rules of pretrial discovery "to define the parameters of the work product rule for purposes of applying the exemption." *Id.* Thus, under the Public Disclosure Act, a citizen has the right to inspect records in an agency's attorney's file unless the requested "documents would not be available to a

party under the discovery rules set forth in the civil rules for superior court..." *Id.* at 600-01. Superior Court Civil Rule 26 provides:

[A] party may obtain discovery of documents and tangible things...prepared in anticipation of litigation...upon a showing that the party seeking discovery has a 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...

C.R. 26(b)(4). The work product doctrine, therefore, does not provide absolute protection. As noted by the Supreme Court of the United States:

Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had...Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning.

Limstrom, 136 Wn.2d at 610, quoting *Hickman v. Taylor*, 329 U.S. 495, 510-12 (1947). Indeed, "[t]he clearest case for ordering production is when crucial information is in the exclusive control of the opposing party." *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 401, 706 P.2d 212 (1985).

Further, the policy of the work product doctrine may be affected by the fact that a Public Disclosure Act request does not arise in the normal context of seeking production of work product. While the work product

privilege is designed to insure "that neither party pirates the trial preparation of another party," *Harris v. Drake*, 116 Wash. App. 261, 269, 65 P.3d 350 (2003), in a public records case, the citizen is not an adverse litigant to the public agency but for the action seeking cause shown to deny disclosure. Thus, the prejudice to the public agency is less than if the agency was embroiled in litigation and required to disclose documents to an adverse party.

b. *The Spokesman-Review Has Demonstrated A Proper "Need" For Access.*

As discussed *supra*, *The Spokesman-Review* is not required to justify the reason for its request. However, *The Spokesman-Review* has a demonstrated need for access to the requested public records to support access under C.R. 26 even beyond the simple fact that it has made a proper request under the Public Disclosure Act.

The District and Nathan Walters' family issued a joint press release when the District agreed to make a payment of nearly \$1 million in August of 2001. C.P. 323-324. The press release states: "through the course of each parties' [sic] investigation, it became apparent that the information [the District and the Walters family] had gathered concerning the circumstances leading to Nathan's death produced differing and

inconsistent versions. Further, it was determined that initial reports of the incident may have been inaccurate or incomplete in many respects." *Id.* According to the District, the "inaccurate or incomplete reports" were those generated by the media, including *The Spokesman-Review*. C.P. 205. *The Spokesman-Review*, therefore, has an obligation to itself and its readers to clarify whatever "inaccurate or incomplete reports" allegedly were published.

Furthermore, even though the District's payment to the Walters family was covered by the District's insurance, the District was required to approve the payment and, in fact, signed the settlement agreement; as a result, there is a substantial public interest in understanding the facts behind the District's decision to make such a significant payment within three months after the death of Nathan Walters. *The Spokesman-Review*, as a media outlet, has an increased interest in disseminating complete and accurate information to the public about such events generating substantial public interest.

In sum, *The Spokesman-Review* need not justify its request for the information because the Public Disclosure Act protects citizens from stating their reasons for seeking access. However, here, *The Spokesman-Review* does have a special need for access, both because of the public's

substantial interest in understanding the facts assembled as part of the District's decision-making process that led to a significant settlement payment and because of the District's critique of media reports, including those published by *The Spokesman-Review*, as "inaccurate or incomplete."

c. *The Spokesman-Review Has No Other Reasonable Route To Obtain The Requested Documents.*

These documents, according to the District, reside only in the files of counsel for the District. C.P. 207. While *The Spokesman-Review* ultimately spoke with three volunteer chaperones who were on the field trip (C.P. 304), it is not possible to determine whether the information provided to the newspaper is the same as the information contained in the files at issue. These interviews with a reporter may not be the same as the statements provided to the District representatives, particularly as to two chaperones, Deanna Lague and Joni Park, who were interviewed for an April 14, 2002 news story (C.P. 327-332) several months after the death of Nathan Walters on May 18, 2001.⁵ Further, attempts by *The Spokesman-Review* to speak with other District employees (including, but not limited to, the principal of Logan Elementary, and Nathan Walters'

⁵This delay occurred because the names of these chaperones were not disclosed to *The Spokesman-Review* until delivery of the District's Index of withheld records to counsel for *The Spokesman-Review* in October, 2001. C.P. 304.

teacher) were rebuffed. C.P. 301-304. In response to media inquiries, the communications director for the District indicated that all communication on the Nathan Walters incident was to be handled by attorneys for the District. C.P. 303. Thus, *The Spokesman-Review* has been denied the ability to recreate the information gathered by the District in its investigation.

Moreover, merely being able to interview a witness to an incident is not the same as having access to a statement produced more contemporaneously to the time the incident occurred:

A substantial number of decisions support [the] position that the availability of the witnesses whose statements are sought obviate the finding of good cause. This view, however, is unduly narrow, inasmuch as the real question is whether the movant can obtain the facts without production of the documents containing the original statements. Therefore, the likelihood that the movant, even though he presently can obtain statements from the witnesses by deposition, will not obtain the substantial equivalent of the prior statements he seeks to obtain through production should also be considered.

Southern Railway Company v. Lanham, 403 F.2d 119, 127 (5th Cir. 1968), *rehearing en banc denied*, 408 F.2d 348 (5th Cir. 1969). In *Lanham*, the court affirmed the trial court's order holding appellant railroad in contempt for failure to produce witness statements taken shortly after an accident. *Id.* at 126-129. The Fifth Circuit focused on the fact that the statements in

question were taken soon after the incident, and required production even though the witnesses were available for deposition. *Id.*

In addition, in the instant case, the records are not merely documents containing information that cannot be replicated, but also are a contemporaneous compilation of how a public agency performs its duties. The policy of the Public Disclosure Act does not require requesting parties to seek out persons who might have provided information to a governmental agency to find out what was provided when the records are available at the public agency. The cost and inefficiency of requiring such effort on the part of individuals seeking to find out how their government operates does not promote a policy of full, open and economical disclosure of public records.

Finally, the District will not be prejudiced by allowing *The Spokesman-Review* access to the requested records because the possibility of litigation related to the death of Nathan Walters is foreclosed by the settlement agreement. Though *The Spokesman-Review* recognizes that work product doctrine protection extends beyond completion of the subject litigation, here, given the inability to gather the information elsewhere and the concession of *The Spokesman-Review* that it seeks only

facts contained in the documents (and not legal opinions, analyses or theories), production to *The Spokesman-Review* will not harm the District.

5. The Attorney-Client Privilege Statute Does Not Constitute A Statute "Which Exempts Or Prohibits Disclosure Of Specific Information" So As To Exempt Attorney-Client Privileged Communications From Disclosure Pursuant To The Public Disclosure Act.

The Spokesman-Review respectfully submits that the Supreme Court improperly created an exemption to the public disclosure of records in the recent decision *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004) by holding that documents covered by the attorney-client privilege are exempt from disclosure pursuant to the Public Disclosure Act. As noted by Justice Johnson, the attorney-client privilege statute, RCW 5.60.60(2)(a), directs an attorney not to disclose a communication with a client without the client's consent. *Id.* at 458 (Johnson, J., dissenting). Thus, "while the attorney-client privilege prohibits attorneys from disclosing information, PDA requests are directed at agencies" and the Public Disclosure Act promulgates a "strong mandate to agencies that they must disclose public information." *Id.*

In addition, a plain reading of the Public Disclosure Act and the attorney-client privilege statute show that the privilege is not within the realm of contemplated statutory exceptions to the Public Disclosure Act.

Id. at 458-59 (Johnson, J., dissenting). The Public Disclosure Act incorporates exemptions from any other statute "which exempts or prohibits disclosure of specific information or records." RCW 42.17.260(l). The attorney-client privilege statute is a broad and general category of documents, in contrast to other statutes that operate to supplement the Public Disclosure Act's exceptions. *See, e.g., PAWS*, 125 Wn.2d 243. In contrast to the attorney-client privilege statute, the trade secrets statute at issue in *PAWS* "exemplifies the type of statute that exempts specific information without conflicting with the PDA's mandate to construe exemptions narrowly." *Hangartner*, 151 Wn.2d at 459 (Johnson, J., dissenting).

Here, the trial court's application of the attorney-client privilege as a rationale for complete exemption of the requested records demonstrates that the breadth of material potentially excluded by claims of attorney-client privilege subrogates the policy of the Public Disclosure Act favoring disclosure. The danger of including the attorney-client privilege statute as a statute that "prohibits disclosure of specific information or records" under the Public Disclosure Act arises from situations like that at issue here, where the District delegated its entire mandated administrative investigation to its hired law firm and private investigator and, therefore,

claims that all of the documents created in the course of that investigation are subject to attorney-client privilege and/or work product doctrine.

6. The Attorney-Client Privilege Does Not Protect Documents Created By Legal Counsel That Are Not Communications With The Public Agency.

The attorney-client privilege attaches to: "(1) communications (2) made in confidence (3) by the client (4) in the course of seeking legal advice (5) from a lawyer in his capacity as such, and applies only (6) when invoked by the client and (7) not waived." *United States v. Abrahams*, 905 F.2d 1276, 1283 (9th Cir. 1990), *overruled in part on other grounds*, *United States v. Jose*, 131 F.3d 1325, 1329 (9th Cir. 1997). The attorney-client privilege is strictly construed. *Pappas v. Holloway*, 114 Wn.2d 198, 203-208, 787 P.2d 30 (1990). A document is not privileged merely because it derives from an attorney-client relationship. *See, e.g., Mead Data Central, Inc. v. United States Department of the Air Force*, 566 F.2d 242, 253 (9th Cir. 1977). The privilege protects certain confidential communications between attorney and client and "extends to documents that contain a privileged communication." *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1977); *see* John H. Wigmore, 8 *Evidence* § 2292 at 554 (1961). The burden of proving the existence of the privilege rests squarely with the party asserting the privilege. *Dietz*, 131 Wn.2d at 844.

Here, the District cannot sustain its burden of proving the records at issue are subject to the attorney-client privilege because there has been no showing that the records contain a privileged communication. The records were not provided to the District. C.P. 161, 207. Though there are records that indicate communications between the private investigator and counsel (*i.e.*, counsel's notes of conversations with the investigator about the interviews conducted by the investigator), there are no similar documents recording communications between counsel and the District. Simply put, the attorney-client privilege does not attach if the records are not confidential communications.

Moreover, at least some of the records concern interviews with persons who had retained their own counsel. The billing records produced by counsel for the District indicate that two separate attorneys representing two teachers contacted the District's counsel. *See* C.P. 239-249. Therefore, two teachers who were present on the field trip had counsel other than lawyers for the District concerning the Nathan Walters incident, and, as a result, an attorney-client privilege does not exist as to interviews or statements provided by these two individuals to either the investigator or counsel for the District.

In sum, the District has failed to provide any support for its argument that the requested records are confidential communications. Moreover, at least some of the documents constitute records of interviews with persons represented by other counsel. Therefore, even assuming the attorney-client privilege statute is an exemption to the Public Disclosure Act, the attorney-client privilege is inapplicable to the records withheld by the District.

7. The District's Selected Disclosure To The Public And To The Walters Family Of Facts Discovered Through Investigation Conducted By The Private Investigator And Law Firm Waives Any Work Product Doctrine And Attorney-Client Privilege Protection.

Selective disclosure of information purportedly gained in a confidential setting constitutes a waiver of both the work product and attorney-client privilege. *See Robinson v. Tex. Auto Dealers Assn.*, 214 F.R.D. 432, 445 (E.D. Tex. 2003) ("[t]he proponent of the attorney-client privilege...must show that the privileged communications not only were intended to be kept confidential, but that they were, in fact, kept confidential"). In *Kenning v. Hunter Health Clinic*, 166 F.R.D. 33 (D. Kan 1996), the defendant health clinic claimed a quality review panel report was protected by work product doctrine and attorney-client

privilege. The court noted that "any claim to privilege is waived" based on a press release and subsequent newspaper article:

A party can't selectively chose [sic] which portions of a document to release to the public and which portions it wishes to assert a privilege.

Id. at 35.

Likewise, in *Electro Scientific Industries v. Gen. Scanning*, 175 F.R.D. 539 (N.D. Cal. 1997), the court held that disclosure in a "news release" of portions of a letter from an attorney constituted a waiver of the attorney-client privilege, reasoning that the news release voluntarily disclosed an important and substantive part of what would have otherwise been a confidential communication from counsel. The court continued:

[I]t makes no sense to hold that no waiver occurs when what is disclosed is the most important part of the privileged communication, but not the details. A sophisticated, well-counseled party who intentionally discloses an important part of an otherwise privileged communication acts in a manner that is thoroughly inconsistent with preserving the confidentiality of that communication. Stated somewhat differently, *a sophisticated party who intentionally discloses the most significant part of an otherwise privileged communication, in an act calculated to advance that party's commercial interests, cannot establish, as law would require, that the party reasonably believed that it would be able to preserve the confidentiality of the other parts of that communication.*

Id. at 543 (emphasis added). In *Brown v. City of Detroit*, 259 F. Supp.3d

611 (E.D. Mich. 2003), a police officer brought a civil rights action against the City. The plaintiff sought discovery of a review board report, portions of which had been intentionally leaked to the media. The court found that the deliberative process privilege was waived by the defendant's intentional disclosure of portions of the report, reasoning:

Defendants seemingly engaged in self-serving leaks of select portions of the executive board's work product, while sharply limiting access to the full substance of the board's report. This is hardly a compelling set of circumstances upon which to rest a claim of privilege. To the contrary, it is precisely under such conditions that privileges are deemed to be waived.

Id. at 623; *see also Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186, 1196 (9th Cir. 2001) ("Where a party raises a claim which in fairness requires disclosure of the protected communications, [attorney-client privilege and work product doctrine protections] may be implicitly waived.").

In addition, disclosure to an adversary waives the work-product protection, even where disclosure occurs in settlement and the parties have an agreement to keep the material confidential. *In re Chrysler Motors Corp. Overnight Evaluation Program Litigation*, 860 F.2d 844, 846-847 (8th Cir. 1988); *see also Grumman Aerospace Corp. v. Titanium Metals Corp. of America*, 91 F.R.D. 84, 90 (E.D.N.Y. 1981) ("[d]isclosure to an

adversary waives the work product protection as to items actually disclosed, even where disclosure occurs in settlement"); *In re Worlds of Wonder Securities Litigation*, 147 F.R.D. 208, 210-211 (N.D. Cal. 1992).

Here, the District may not claim either a work-product or attorney-client privilege protection concerning the facts relating to the Nathan Walters incident because it has chosen to make public at least some of the facts it assembled. The District's entire investigation into the incident – starting with the day that Nathan Walters died – was conducted by its private investigator and counsel. The District acknowledges that no District personnel were involved in the investigation of the incident other than those who provided information to the private investigator and the law firm. C.P. 201. As a result, any facts about the incident obtained by the District necessarily came from the investigation conducted by the private investigator and law firm.

The District has, nevertheless, repeatedly released information obtained as part of the investigation to the public. For instance on May 22, 2001, Superintendent Livingston gave a press conference at which he described in detail information about the field trip and Nathan Walters death. C.P. 309-310. Superintendent Livingston disclosed the following facts: (1) the District and Nathan's parents had communicated about

Nathan's allergies, including his allergy to peanuts, upon Nathan's transfer to Logan Elementary in spring 2001; (2) when Nathan went on the field trip, "the District followed its standard procedure of making sure that Nathan's asthma inhaler and an Epi-pen [a shot used to counteract an allergic reaction] were taken along..."; (3) two third grade classes went on the field trip, and a sack lunch request was made for the students to the District's food services staff by one of the third grade teachers; (4) "[i]t appears at this time that no special lunch request was made by the school staff for Nathan"; (5) Nathan reported not feeling well after lunch and "in light of his exposure to peanut products, the teacher made telephone contact with Nathan's home"; (6) a parent chaperone who is also a licensed practical nurse assisted in describing his condition to the person at Nathan's home; (7) on the bus, Nathan was with the chaperone who is a nurse and used his inhaler; (8) Nathan had a previously-scheduled doctor's appointment, and "[i]t was eventually requested that someone from the field trip drive Nathan home"; (9) a chaperone agreed to drive Nathan home, and left with Nathan and the chaperone who is a nurse; (10) on the way home, "Nathan's condition worsened," he used his inhaler again, and the chaperones stopped at a fire station; (11) there were no emergency medical personnel at the fire station at the time, but 9-1-1 was called and

emergency medical personnel came to the fire station; (12) prior to the arrival of the emergency medical personnel, the nurse gave Nathan an Epi-pen shot; and (13) Nathan was eventually transported to Holy Family Hospital by the emergency medical personnel, where he died. C.P. 309-310.

In short, at the same time the District asserts that all information gathered by the private investigator and counsel as part of the investigation was work product or protected under the attorney-client privilege, Superintendent Livingston made extensive disclosure to the public of information and facts that could have been assembled *only* as part of the investigation undertaken by the private investigator and counsel for the District.

Moreover, three chaperones who were on the field trip have chosen to make public what they observed on the field trip. *See* C.P. 301, 304. Despite the fact these three chaperones have publicly discussed the circumstances of Nathan Walters' death, the District continues to assert a work product and/or attorney-client privilege to interviews conducted by investigator David Prescott with the three chaperones. *See* C.P. 223-237 (Document Nos. 7-10, 13, and 14).

In addition to the District's disclosures to the public, some information relating to the facts assembled by the District's investigator and legal counsel was released to the Walters family during the communications leading to the settlement. Indeed, the joint press release issued by the District and the Walters family makes reference to the parties' inconsistent versions of what had occurred. C.P. 323-324. The only way the parties could have been determined that inconsistencies existed between their separate investigations would be if the District chose to reveal to the Walters family what its investigation had shown. Therefore, the District clearly released information obtained in the investigation conducted by its private investigator and counsel to the Walters family, and waived work product doctrine protection as to that material. *See, e.g., Chrysler Motors Corp.*, 860 F.2d at 846-847.

In sum, the District selectively disclosed to both the public and the Walters family, an adversary, facts that it could only have knowledge of through the investigation conducted by its private investigator and legal counsel. In such circumstances, any privilege or work product protection that existed as to the facts assembled in the course of the investigation has been waived.

8. *The Spokesman-Review Is Entitled To Attorney's Fees.*

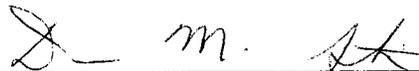
RCW 42.17.340(4) provides that any person who prevails against an agency in a public records case shall be awarded all costs, including reasonable attorney's fees, incurred in connection with such legal action. *The Spokesman-Review* thus respectfully requests that, pursuant to RCW 42.17.340(4), it be awarded its attorney's fees and costs incurred both at the trial court level and at the appellate level in defending this public records action.

E. CONCLUSION

For the reasons set forth above, *The Spokesman-Review* requests that the Order of the trial court granting summary judgment and denying access to the requested public records be reversed and an Order be entered requiring the Spokane School District No. 81 to make available for public inspection the requested documents.

RESPECTFULLY SUBMITTED this ^{27th} ___ day of September, 2004.

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d/b/a *The Spokesman-Review*

CERTIFICATE OF SERVICE

On the 21 day of September, 2004, I served the within document described as **BRIEF OF APPELLANT** on all interested parties to this action as follows:

Teresa Walters
4430 Lexi Circle
Broomfield, CO 80020

 X U.S. Mail

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