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No. 231364

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

COWLES PUBLISHING COMPANY, a Washington corporation,

Appellant,

v.

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.

APPEAL FROM SPOKANE COUNTY SUPERIOR COURT

THE HONORABLE JEROME LEVEQUE

PETITION FOR DISCRETIONARY REVIEW BY THE SUPREME COURT

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I. IDENTITY OF PETITIONER

Petitioner Cowles Publishing Company is the publisher of *The Spokesman-Review* newspaper (hereinafter "*The Spokesman-Review*"). A reporter from *The Spokesman-Review* made the public disclosure act request that is the subject of this litigation.

II. CITATION TO COURT OF APPEALS DECISION

The decision of the Court of Appeals was filed on March 9, 2006 by Division III and is attached hereto in the Appendix at A-1. The Court of Appeals has designated that the decision will be published. No motion for reconsideration was filed.

III. ISSUES PRESENTED FOR REVIEW

The Spokesman-Review filed a public records request, pursuant to Chapter 42.17 RCW (the Public Disclosure Act), seeking records related to the death of child from an acute allergic reaction sustained while on a school field trip. The records at issue comprise documents and notes prepared by District employees, notes written by a chaperone, an investigator's notes of witness interviews, photographs taken by the investigator, a map drawn by the investigator, and notes of counsel for the District of discussions with the investigator.

The District filed the instant suit against *The Spokesman-Review*,

seeking a declaratory judgment that the District need not disclose the requested records. The Court of Appeals held, in relevant part, that: (1) the requested records constitute attorney work product, exempt from disclosure under RCW 42.17.310(1)(j)¹; (2) the “substantial need” exception to the work product doctrine does not apply to work product that is a public record under the Public Disclosure Act; (3) a public agency to whom a records request is made may bring suit, under RCW 42.17.330, against a requesting party in lieu of denying a request and seek an injunction barring itself from disclosing the requested records; (4) RCW 42.17.330 allows an agency to seek court protection barring disclosure upon a showing of irreparable harm even if no exemption applies; and (5) an agency seeking court protection under RCW 42.17.330 that demonstrates that an exemption applies need not meet the standard for injunctive relief codified by RCW 42.17.330.

The Spokesman-Review seeks discretionary review on the following issues:

1. Does RCW 42.17.330, which states that “an agency or its representative or a person who is named in the record or to whom the

¹ The Public Disclosure Act was recodified effective July 1, 2006, into chapter 42.56. For the Court’s convenience, *The Spokesman-Review* herein cross-references the new RCW citations in the Table of Authorities.

record specifically pertains” may seek injunctive relief, allow an agency which possesses a public record to commence litigation against a requesting party seeking an injunction against itself barring disclosure in lieu of simply denying the request as required under RCW 42.17.320?

2. Assuming arguendo that RCW 42.17.330 does allow an agency to commence litigation against a requesting party in lieu of denying a request, does Section 330 require the agency to demonstrate: (1) that an exemption applies; and (2) that disclosure would clearly not be in the public interest and would substantially and irreparably damage any person or vital government functions?

3. Are all records related to the death of a child on a school-sponsored field trip exempt from public disclosure because a private investigator and legal counsel conducted an investigation and assembled records in place of administration records which the agency is required to generate under its own policies concerning incidents involving injuries to students?

4. 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 even though litigation concerning the incident and information available to the public derived

therefrom is foreclosed as a possibility and the public has no reasonable alternative route to obtain the public records in question or does the Act incorporate the “substantial need” exception in Civil Rule 26?

IV. STATEMENT OF THE CASE

On May 18, 2001, Nathan Walters, a 10-year-old student in 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 thereupon contacted the District’s outside counsel and turned over to the firm (and later to a private investigator²) the District's entire investigation into the death of Nathan Walters. C.P. 190-91.

A. THE INVESTIGATION REQUIRED BY THE DISTRICT'S ADMINISTRATIVE PROCEDURES WAS CONDUCTED ENTIRELY BY A PRIVATE INVESTIGATOR AND LAW FIRM.

In 2001, the District had in place detailed administrative procedures to be followed in the event of injury to a student. *See* C.P. 249–253. These procedures required an investigation by the District and the compilation of a variety of written documentation. *Id.*

² The District’s superintendent publicly stated that the investigator was hired to perform an “objective” investigation into the incident. C.P. 309-12.

Concerning Nathan Walters, however, District personnel only completed an incident report form, containing, by the District's own admission, only minimal information. C.P. 178. The District's entire administrative investigation into the events of May 18, including witness interviews and assembly of facts about the incident required under the District's administrative procedures, was conducted by the investigator and the law firm. All records of the investigation were maintained by the law firm; none have been retained in the District's files. C.P. 207.

B. AFTER *THE SPOKESMAN-REVIEW* FILED A PUBLIC RECORDS REQUEST, THE DISTRICT BROUGHT THIS LAWSUIT AGAINST *THE SPOKESMAN-REVIEW* SEEKING AN INJUNCTION AGAINST ITSELF AND A DECLARATORY JUDGMENT THAT ALL OF THE RECORDS AT ISSUE ARE EXEMPT FROM DISCLOSURE UNDER THE PUBLIC DISCLOSURE ACT.

Two months after the public records request, 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.³

³ 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 the newspaper. 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. The Soter portion of the lawsuit was resolved, and the Soter

The District, as a plaintiff, sought to enjoin itself from disclosing the records. On May 30, 2003, the trial court entered an Order releasing for public review the settlement agreement between the District and the Walters family. C.P. 137-138. The agreement shows that in August 2001 the District, through an insurance company, paid out \$985,000 to the Walters family following a confidential mediation session. C.P. 219-222.

Upon the motion of *The Spokesman-Review*, the trial court issued an Order to Show Cause on March 12, 2004. C.P. 34-37. Thereafter, the trial court granted the District's Motion for Summary Judgment. C.P. 765. 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.

C. THE COURT OF APPEALS' DECISION RENDERS THE INJUNCTIVE STANDARD CODIFIED IN THE ACT INAPPLICABLE TO PUBLIC AGENCIES AND ALLOWS AGENCIES TO SUE REQUESTERS INSTEAD OF MERELY DENYING A REQUEST.

The Court of Appeals affirmed, holding that all of the requested

representatives withdrew 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, at his request, voluntarily dismissed as a plaintiff. C.P. 20-25.

documents constitute “classic” attorney work product “imbued” with attorneys’ mental impressions, research, legal theories, opinions and conclusions. A-7-A-8. The Court further held that the District did not delegate its internal administrative processes to outside counsel and the investigator. A-12-A-15. Though the Court did not determine whether the “substantial need” exception to the work product doctrine could ever be met in a Public Disclosure Act request, the Court held that, in this case, the requested records would be protected because they constitute the type of work product that can never be discovered even with a demonstrated substantial need under Civil Rule 26.

Though recognizing that, in this case, because of *The Spokesman-Review*’s motion on the merits, the issue was moot as to whether the District could file a lawsuit seeking declaratory relief instead of denying the request, the Court determined that this issue was likely to recur and should be addressed. The Court held that RCW 42.17.330 constitutes an “injunction provision for agencies” that allows an agency asserting an exemption to seek a judicial ruling “when *either* agency functions *or* individuals would be irreparably damaged by disclosure.” A-26 (emphasis in original). The Court further held that an agency seeking a judicial ruling under RCW 42.17.330 may obtain court protection if either: (1) an

exemption applies; or (2), if no exemption applies, the agency demonstrates irreparable harm would occur with disclosure. A-18. Stated differently, the Court found that RCW 42.17.330 constitutes a substantive exemption barring disclosure of records if disclosure would result in irreparable harm.

V. ARGUMENT

A. THE COURT OF APPEALS' DECISION CONFLICTS WITH A SUPREME COURT DECISION AND INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

The Supreme Court may grant discretionary review if the decision “is in conflict with a decision of the Supreme Court.” RAP 13.4(b)(1). Here, the Court of Appeals’ rulings regarding RCW 42.17.330 conflict with the Supreme Court’s decision in *Progressive Animal Welfare Society (“PAWS”) v. University of Washington*, 125 Wn.2d 243 (1994). Review may also be accepted if the case “involves an issue of substantial public interest...” RAP 13.4(b)(4). Issues are appropriate for review if the outcome has the potential to affect other proceedings. *E.g., State v. Watson*, 155 Wn.2d 574, 577 (2005). As described below, the Court of Appeals’ decision likely will affect all public records requests in the State.

B. THE COURT OF APPEALS’ RULINGS REGARDING THE SCOPE AND APPLICABILITY OF RCW 42.17.330 CONTRAVENE THE PLAIN LANGUAGE OF THE STATUTE AND WASHINGTON CASE

LAW AND VIOLATE THE STATED POLICY OF THE PUBLIC DISCLOSURE ACT.

1. The Court Of Appeals' Rulings Affect All Public Disclosure Requests In The State Of Washington And Puts Requesters At Risk.

The ruling has an impact that reverberates throughout Washington. *The Spokesman-Review*, as do all requesters of public records in Washington, now faces a possible lawsuit for each and every public records request submitted. The ruling encourages agencies to file lawsuits and force requesters into court to incur fees in defending requests. The ruling releases agencies from the requirements under RCW 42.17.320 to either disclose records or deny requests under applicable exemptions.

The Court of Appeals blithely stated that a requester should not mind being hauled into court in response to submitting a public records request because, if the requester prevails, the requester will be entitled to attorneys fees and statutory penalties. This ignores the spirit and purpose of the Public Disclosure Act, to give ordinary citizens, who may be unfamiliar with the multitude of statutory exemptions and other relevant statutes, the ability to find out what public records exist and public information contained therein. The Court's ruling puts the burden on the requester to know and be able to correctly apply each and every exemption

or else defend a costly and lengthy lawsuit.

The ruling ignores the mandate of RCW 42.17.320, which provides an agency only three specific options upon receipt of a request: (1) release the record; (2) deny release; or (3) seek additional time to release or deny release. The Act contemplates that it is the requester who determines the progression of the request and how much time and expense to dedicate. A requester alone is permitted to seek an attorney general opinion. RCW 42.17.325. A requester may seek an order to show cause. A requester may litigate against an agency if he or she believes that the cited exemption does not apply. RCW 42.17.340.

In the alternative, a requester can decide not to pursue a request further. The public, therefore, is entitled to determine how far to take a request. As observed by the North Carolina Court of Appeals, “[a]llowing a governmental agency to bring a declaratory judgment action against someone who has not initiated litigation will have a chilling effect on the public, in essence eliminating the protection offered them under the statute by requiring them ‘to defend civil actions they otherwise might not have commenced,...thus frustrating the Legislature’s purpose of furthering the fundamental right of every person...to have prompt access to information in the possession of public agencies.’” *City of Burlington v. Boney*

Publishers, 600 S.E. 2d 872, 877 (N.C. App. 2004), citing *McCormick v. Hanson Aggregates Southeast, Inc.*, 596 S.E.2d 431, 434 (N.C. App. 2004).⁴

The Court's ruling eliminates the requester's statutory prerogative under RCW 42.17.340 to determine whether to pursue a request or accept a denial and exposes the requester to a lawsuit just for making a request. The ruling further removes public agencies' statutory burden to determine whether an exemption applies to a requested record. Because this ruling gives free rein to public agencies to sue requesters, the result is a likely significant increase in the number of public records lawsuits. This would eliminate the efficient response mechanism of the Act, and create a costly burden for requesters and the courts.

2. The Court Of Appeals' Ruling Contravenes The Plain Language Of The Statute.

RCW 42.17.330 states, in pertinent part:

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains...

The language of the statute, therefore, contemplates that injunctive relief

⁴ For the Court's convenience, cases cited herein from other jurisdictions are appended hereto.

may be sought by a person or an agency “named in the record or to whom the record specifically pertains.” *Id.*

This corresponds with the Public Disclosure Act’s recognition that agencies which have determined that records should be disclosed may contact “persons” named in those records so that they may seek injunctive relief. *Id.* The term “person” as defined by the Act specifically includes government agencies. RCW 42.17.020(35). The Act, therefore, provides that persons or agencies named in the requested records may seek protection, but only if the agency in possession of the records has determined disclosure is required.

The Court of Appeals’ ruling expands the statutory language and adds a third party who may seek an injunction – the very agency with control over the records – thus allowing an agency to seek an injunction against itself. No Washington court has addressed the propriety of a public agency seeking injunctive relief against itself in lieu of simply denying a request for public records and allowing the requester to determine whether to seek judicial review. Division III is correct, however, that this situation is likely to repeat itself. For example, though the Court did not address the issue, the Supreme Court held in *In re Request of Rosier*, 105 Wn.2d 606, 617 (1953), that an agency should not

be assessed statutory penalties when it was the trial court, not the agency, which made the decision that the records were exempt, after the agency sued the requester rather than determine whether or not disclosure was required. *See also* Karl B. Tegland, 15 WASH. PRAC. § 44.1 n.1 (1st ed. 2003) (addressing *Rosier* as an “interesting situation [where] a party sought an injunction prohibiting itself from releasing certain information”). This novel procedure sanctioned by the Court also contravenes the well-established rule that an injunction is issued against an adverse party, not the movant. *E.g.*, CR 65.

3. RCW 42.17.320 Does Not Permit An Agency To Initiate Litigation In Response To A Public Records Request.

Under RCW 42.17.320, a public agency, upon receipt of a request for public records, has only three possible responses: (1) provide the record; (2) acknowledge receipt of the request and provide an estimate of time required to comply; or (3) deny the request with a written statement of the reasons supporting the denial. RCW 42.17.320; *Police Guild v. Liquor Control Board*, 112 Wn.2d 30, 34-35 (1989); *Smith v. Okanogan County*, 100 Wn. App. 857, 864 (2000) (“The statute provides for only three possible responses...”). An agency that “fails to respond as provided in RCW 42.17.320...violates the Act and the individual requesting the

records is entitled to a statutory penalty.” *Smith*, 100 Wn. App. at 862; *Rosier*, 105 Wn.2d at 626-27 (Anderson, J., dissenting in part and concurring in part).

The Court of Appeals’ ruling improperly provides a fourth alternative, that an agency, instead of denying a request, may bring a lawsuit against a requestor and ask the Court to determine whether or not a record is exempt from disclosure. This contravenes not only the statutory framework enacted by the legislature, but also the detached process by which an agency’s decision may be reviewed. For example, under RCW 42.17.325, once an agency denies access to a record, the requesting party (not the agency) may seek an opinion from the attorney general as to the denial. RCW 42.17.325. That party may also file a motion for an order to show cause. RCW 42.17.340. At no point is the agency empowered to litigate rather than make the required determination under RCW 42.17.320. The Court’s ruling thus impermissibly expands the scope of the statute and affects every public records request in the state. As such, discretionary review is appropriate.

4. The Court’s Ruling That Section 330 Is A Substantive Exemption From Public Disclosure Contravenes Well-Settled Law And The Plain Language Of The Statute.

The Court of Appeals held that Section 330 allows the trial court to

issue an injunction blocking disclosure either if: (1) an exemption applied; or; (2) even if no exemption applied, irreparable harm was demonstrated by the agency. This holding is directly contrary to well-settled law and the plain language of the statute.

RCW 42.17.330 reads, in part:

The examination of any specific public record may be enjoined if...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 governmental functions...

The law is well-settled that RCW 42.17.330 is not a substantive basis for nondisclosure, but simply “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.” *PAWS*, 125 Wn.2d at 257-58 (emphasis in original); *Does v. Bellevue School Dist. # 405*, 129 Wn. App. 832, 849, ¶ 29 (2005) (“section .330 does not furnish an independent basis for withholding” records). Therefore, a party seeking injunctive relief must demonstrate: (1) the records are exempt from disclosure under the Public Disclosure Act’s substantive exemption provisions; (2) disclosure is not in the public interest; and (3) irreparable injury will result if the records are disclosed:

Stated another way, section .330 governs access to a remedy, not the substantive basis for that remedy... “[W]e start with the proposition that the act establishes an affirmative duty to disclose public records *unless the records fall within specific statutory exemptions or prohibitions*. It follows that **in an action brought pursuant to the injunction statute (RCW 42.17.330), the initial determination will ordinarily be whether the information involved is in fact within one of the act's exemptions or within some other statute which exempts or prohibits disclosure of specific information or records**”... The Legislature did not intend to entrust to either agencies or judges the extremely broad and protean exemptions that would be created by treating section .330 as a source of substantive exemptions....**If section .330 were a source of broad exemptions for personal privacy and vital governmental interests, it would render the carefully crafted exemptions of RCW 42.17.310 superfluous.**

PAWS, 125 Wn.2d at 258-61 (italics in original; boldface added) (internal citations omitted).

In sum, the Court of Appeals' ruling is directly contrary to the Supreme Court's holding in *PAWS* and the plain language of the statute. A party seeking injunctive relief must show both an applicable exemption and irreparable harm. As such, the Court should allow discretionary review to correct this misapplication of law.

C. THE WORK PRODUCT DOCTRINE IS NOT AN ABSOLUTE BAR TO DISCLOSURE WHERE, AS HERE, THE PUBLIC HAS NO AVAILABLE AVENUE TO DISCOVER FACTS RELEVANT TO AN AGENCY'S DECISION.

The Court’s ruling allows a public agency to avoid its statutory requirements to disclose public records by designating a private investigator and outside counsel as the sole parties responsible for assembling and maintaining all records pertaining to an issue of public importance – the death of a 10-year-old child on a school-sponsored field trip and payment of \$985,000 concerning the same. The Court of Appeals did not reach the question of whether the “substantial need” exception to the work product doctrine could be met concerning a Public Disclosure Act request, finding that, in this case, all of the requested records would be still be protected because they constitute the type of work product that can never be discovered, even with a demonstrated substantial need under the Civil Rules. Because, as discussed below, an agency should not be permitted to shield all records related to an issue of significant public importance when a substantial need exists for disclosure, the Supreme Court should accept discretionary review as to the scope and application of the substantial need exception to the work product rule when, as here, the possibility of litigation is foreclosed and no other avenue exists for the public to garner information about a specific incident.

The Supreme Court recognized in *Limstrom v. Ladenburg*, 136 Wash.2d 595, 605-606 (1998) that Civil Rule 26 sets the appropriate

standard as to whether work product could be disclosed in response to a public records request. Rule 26(b)(4) contemplates disclosure to an adverse party who is preparing a case against the disclosing party. As such, the key phrase “substantial need” related to “preparation of [the party’s] case” underscores that the disclosure is appropriate in circumstances when a party cannot fairly litigate absent access to work product prepared by the party’s adversary. Disclosure would be permitted, therefore, where a party could not get those facts from answers to interrogatories, depositions, or other discovery mechanisms.

The Legislature clearly determined that access to public records is a substantial need in lodging sovereignty in the people, not public agencies:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they created.

RCW 42.17.251. Indeed, “an informed public is the essence of a working democracy.” *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983). Although in a public records case, there is no litigation in which the party making the

request requires disclosure in order to fairly litigate, the *Limstrom* Court explicitly applied Rule 26 to public records act cases. In *Limstrom*, access to the records in question was not provided because they were available from another public agency. *Limstrom*, 136 Wn.2d at 614.

However, in the case at bar, there is no avenue for accessing the information contained in the records from any other public source. No written claim was filed with the District. No litigation preceded the \$985,000 settlement, and therefore no court hearings or discovery occurred. The facts of the incident repose solely in the files of the District's counsel. Thus, the substantial need exception to the work product rule, as reflected in the Public Disclosure Act, should be applied under the facts of this case.

Secondly, under RCW 42.17.310(1)(j), it is appropriate for the Court to analyze the exemption while taking into account the metaphorical need, under Rule 26, of the putative litigants, Nathan Walters' parents. Nathan Walters' parents would have been able to obtain from the District information as to the facts assembled in the subject records, including, for example, copies of the photographs of the field trip location taken by the private investigator. C.P. 80. In fact, the mediation process between Nathan's parents and the District included disclosure by the District of

facts assembled by its counsel and investigator following the accident.
(District's Response Br., p. 57.)

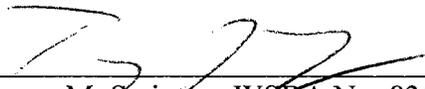
Given that the work product exception to the Public Disclosure Act is an oft-utilized exemption by agencies, this issue is likely to recur. As such, the Supreme Court should grant discretionary review and determine that an agency may not withhold facts contained in public records related to an incident of public import when, as here, there is no possibility of litigation and no other avenue from which the information contained in the records may be obtained by the public, and where putative litigants would have been able to obtain disclosure of the factual portions of the records.

VI. CONCLUSION

For these reasons, *The Spokesman-Review* respectfully requests that the Supreme Court grant discretionary review.

RESPECTFULLY SUBMITTED this 16th day of April, 2006.

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CERTIFICATE OF SERVICE

On the 10th day of April, 2006, I served the within document described as **Petition for Discretionary Review** on all interested parties to this action as follows:

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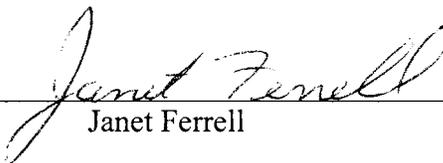
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Janet Ferrell

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(N.C. App. 2004) A-34

*Minneapolis Star and Tribune Company v. Minnesota
Commissioner of Revenue*, 460 U.S. 575 (1983)..... A-44

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS 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, individually, and)
as parents of NATHAN WALTERS, a)
deceased minor child,)

Plaintiffs,)

SPOKANE SCHOOL DISTRICT NO.)
81, a Washington municipal)
corporation,)

Respondent,)

v.)

COWLES PUBLISHING COMPANY,)
a Washington corporation,)

Appellant.)

No. 23136-4-III

Division Three

PUBLISHED OPINION

SWEENEY, J.—This is a public disclosure act dispute, RCW 42.17.250–.348. A newspaper requested records of an investigation and settlement by Spokane School District No. 81 (District) following the wrongful death of a young student from

anaphylactic shock. The District fed the child a peanut-laden snack lunch despite knowledge that he was allergic to peanuts. The documents requested were all generated by the District's attorneys and their investigators. The District consulted the attorneys to give advice and prepare for the anticipated wrongful death claim, which quickly followed the child's death. We conclude that the requested documents were attorney work product and affirm the refusal of the trial judge to order disclosure.

FACTS

A child died from an acute allergic reaction to peanuts while on a field trip with his elementary school class. His medical condition was well known to the District's food staff, the boy's teacher, and the organizers of the field trip, including two school nurses and several parent volunteers. Nevertheless, only peanut-laden snack lunches were provided. The child reported that he did not feel well after tasting a peanut-based cookie. The chaperones did not want to curtail the activities for the other children. So they put the sick child in the school bus to wait. His condition became acute and he was finally taken to a hospital by car. He received an epinephrine injection for the first time on the way. The response was too late and the child died.

Associate District Superintendent Mark Anderson was informed of the unfolding tragedy by telephone. He recognized the urgent need for legal counsel and immediately called the District's private law firm. Counsel advised that a wrongful death action was a near certainty. The lawyers then took over all aspects of the District's response. They

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told Mr. Anderson to send them any documents in the District's files about this child, the field trip, and the District's policies and procedures. All of these preexisting documents were released upon request, and none is at issue here. Respondent's Br. at 23 n.9.

The law firm hired a private investigator to gather facts and interview witnesses. The lawyers prepared all documents and counseled the District to keep the investigation confidential. The law firm quickly negotiated a settlement between the District and the child's parents. The settlement agreement was also released.

In addition to the records provided, The Spokesman Review, a Spokane regional daily newspaper published by Cowles Publishing Company, requested additional records relating to the incident, pursuant to provisions of the public disclosure act. At issue here are the investigator's notes of interviews with witnesses, the investigator's hand-drawn map, counsel's conference notes, and counsel's report to the District's large loss insurer evaluating the District's legal position. Documents List Nos. 4-75, Clerk's Papers (CP) at 223-37.

The deceased child's parents and the District moved the superior court for a declaration that the records were exempt from disclosure. *See* RCW 42.17.330. The District asserted the statutory exemptions for attorney work product and attorney-client privilege. Cowles moved to require the District to show cause why the documents should not be produced. The District moved for summary judgment.

The trial court examined the documents in camera and concluded they were “classic” attorney work product and attorney-client privileged material and exempt from disclosure under RCW 42.17.310(1)(j).

Cowles appeals.

DISCUSSION

Cowles relies on two essential arguments. First, it characterizes its request as being only for the bare facts about the field trip and how peanuts ended up in this student’s lunch. And, it argues, such purely factual information is not protected under the work product doctrine. Cowles denies any claim to documents that reflect an attorney’s mental impressions or legal theories. It argues that witness interview notes and maps are not attorney work product because they contain essentially facts from which any mental impressions or legal theories of counsel could easily be redacted. Second, Cowles argues that the documents should not be protected because they *should* have been generated by the District, not by lawyers.

The District responds that the records are exempt from disclosure by the plain language of the public disclosure act. They are (a) “relevant to a controversy to which an agency is a party” and (b) would not be available to an adverse party under the superior court pretrial discovery rules. RCW 42.17.310(1)(j); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 605, 963 P.2d 869 (1998).

STANDARD OF REVIEW AND CANONS OF CONSTRUCTION

The decision to exempt public documents as attorney work product presents a mixed question of law and fact. *See Limstrom*, 136 Wn.2d at 606. The definition of work product is a question of law that we review de novo. RCW 42.17.340(3); *see Limstrom*, 136 Wn.2d at 606. But whether a particular document falls within the definition of work product under that interpretation is a finding of fact. *Dawson v. Daly*, 120 Wn.2d 782, 792, 845 P.2d 995 (1993). We will uphold the trial court's findings of fact if substantial evidence supports them. *Org. to Preserve Agric. Lands v. Adams County*, 128 Wn.2d 869, 882, 913 P.2d 793 (1996).

We construe the disclosure provisions of the public disclosure act broadly and the exemptions narrowly. *Dawson*, 120 Wn.2d at 789-90. And we try to harmonize the statute with the court rules, giving full effect to both. *Id.* at 790.

WORK PRODUCT

The public disclosure act applies when a member of the public asks an "agency" for a "public record." *Id.* at 788. The District is an agency. A public record is "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by" an agency. Former RCW 42.17.020(36) (1995); *Dawson*, 120 Wn.2d at 789. These records are, then, public records.

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The public disclosure act requires disclosure, therefore, unless a specific exemption can be found in the public disclosure act or in another statute. RCW 42.17.260(1); *Limstrom*, 136 Wn.2d at 604; *Dawson*, 120 Wn.2d at 789.

The public disclosure act contains a specific exemption for records that "are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts." RCW 42.17.310(1)(j). A "controversy" is not restricted to ongoing formal litigation. It can begin before the formal commencement of a lawsuit and continue afterward. *Dawson*, 120 Wn.2d at 790 (citing *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 400, 706 P.2d 212 (1985)). Relevant records are exempt from disclosure under the public disclosure act if they would not be available to an adverse party under the superior court discovery rules. RCW 42.17.310(1)(j); *Limstrom*, 136 Wn.2d at 605.

A trial judge has broad discretion to manage the discovery process so as to ensure full disclosure of relevant information while protecting the litigants against harmful side effects of disclosure. *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 905, 25 P.3d 426 (2001). The rules protect material defined as attorney work product. CR 26(b)(4). The parties here dispute the definition of work product on these facts.

The attorney work product doctrine first appears in *Hickman v. Taylor*.¹ It is intended "to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) (quoting *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S. Ct. 385, 91 L. Ed. 451 (1947)). The *Hickman* doctrine is now codified in the civil rules at Fed. R. Civ. P. 26(b)(3) and Washington's CR 26(b)(4).

[A] party may obtain discovery of documents . . . discoverable . . . and prepared in anticipation of litigation or for trial by or for another party . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

CR 26(b)(4).

Work product under the public disclosure act is the same as work product under the civil rules. *Dawson*, 120 Wn.2d at 789-90. It is defined according to the common law. *Limstrom*, 136 Wn.2d at 605. We therefore turn to case law to define work product under the public disclosure act.

Work product refers to documents prepared by counsel in anticipation of litigation. *Heidebrink*, 104 Wn.2d at 396. There are two categories: (1) factual information; and (2) attorneys' mental impressions, research, legal theories, opinions, and conclusions.

¹ *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947).

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Limstrom, 136 Wn.2d at 605-06. Disclosure of counsel's memoranda of witnesses' oral statements is "particularly disfavored because it tends to reveal the attorney's mental processes." *Upjohn Co. v. United States*, 449 U.S. 383, 399, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). Notes of oral statements gathered during preparation for litigation are included with mental impressions in the "opinion" work product category. *In re Firestorm 1991*, 129 Wn.2d 130, 159, 916 P.2d 411 (1996) (Madsen, J., concurring).

The court may allow an adverse party to discover factual information gathered by an attorney upon a showing of substantial need for the information in preparing the party's case and an inability to obtain the substantial equivalent without undue hardship. CR 26(b)(4); *Heidebrink*, 104 Wn.2d at 395. Opinion work product, by contrast, enjoys nearly absolute immunity. Work product protection belongs to the attorney as well as to the client. *United States v. Nobles*, 422 U.S. 225, 238-39, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975). The court may release it only in very rare and extraordinary circumstances. CR 26(b)(4); *Upjohn*, 449 U.S. at 401; *Pappas v. Holloway*, 114 Wn.2d 198, 211, 787 P.2d 30 (1990).

Work product documents need not be prepared personally by counsel; they can be prepared by or for the party or the party's representative, so long as they are prepared in anticipation of litigation. *Heidebrink*, 104 Wn.2d at 396; *Smith v. Diamond Offshore Drilling*, 168 F.R.D. 582, 584 (S.D. Tex. 1996).

Here, the court found that these documents were prepared in anticipation of litigation. And, indeed, based on the nature of this incident, counsel's advice to the District, and the fact that a claim was in fact filed within days, that finding is easily supported by substantial evidence in this record. *Adams County*, 128 Wn.2d at 882. The documents were memoranda of witnesses' oral statements to the investigator and notes by lawyers of their own pretrial preparations. Our independent review of the documents confirms the court's characterization of them as "classic" work product. CP at 760.

EXCEPTIONS TO THE WORK PRODUCT RULE

The courts have recognized some exceptions to the work product doctrine to ensure the just and fair resolutions of disputes. *Heidebrink*, 104 Wn.2d at 400. Cowles asks us to apply one or more of these exceptions.

Bad Faith

Cowles correctly contends that an attorney's mental impressions are not protected from discovery if what the attorney knew and when he knew it is directly at issue in the litigation. *Escalante v. Sentry Ins. Co.*, 49 Wn. App. 375, 397, 743 P.2d 832 (1987), *overruled on other grounds by Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 15 P.3d 640 (2001). Here, Cowles contends the District's lawyers had information that was directly at issue. But this misses the point of the "bad faith" exception. This exception accommodates bad faith litigation.

A plaintiff must prove what a defendant knew and when it knew it to show bad faith. But counsel's opinion work product must be central to a party's claim or defense to justify an exception to the strict protection of the rule. *Pappas*, 114 Wn.2d at 212. This occurs in insurance bad faith cases where communications about the insured passing between an insurer and its attorney are not privileged. *Barry v. USAA*, 98 Wn. App. 199, 204, 989 P.2d 1172 (1999). In *Escalante*, for example, the insurance company's attorney's mental impressions at a given time were relevant to the disputed issues in the bad faith claim. *Escalante*, 49 Wn. App. at 393. The fact that counsel had certain information was at the core of the bad faith claim.

But a public disclosure act request is not comparable to bad faith litigation. Bad faith was not an issue in the controversy in which counsel represented the District. The facts justifying exception to the work product rule simply do not exist.

Ordinary Course of Business

Cowles misconstrues the exception for records that are generated by the defendant in the ordinary course of business, that is, before any threat of litigation. Of course, merely turning such records over to counsel does not make them work product. Cowles argues that records that were not—but *should have been*—generated in the ordinary course of an agency's business are discoverable even if they were created by counsel in anticipation of litigation. The District responds (a) that the District was not required to generate these records by any administrative procedure and (b) it is immaterial in any

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event. Even if the District should have generated records, the documents at issue here were in fact created by counsel solely for litigation purposes. They were never forwarded to anyone at the District nor were they intended for routine administrative purposes.

The business records exception prevents parties from exploiting the work product rule by adopting routine practices whereby all documents appear to be prepared “in anticipation of litigation.” *Heidebrink*, 104 Wn.2d at 400. The work product doctrine does not shield records that a party would have generated pursuant to “ordinary course of business” administrative procedures even without the prospect of litigation. *Id.* at 399.

To identify “ordinary course of business” documents, we look to “the specific parties involved and the expectations of those parties.” *Id.* at 400. In *Heidebrink*, the court protected a statement an insured motorist made to the insurance company’s investigator after an accident. The court reasoned that litigation is always anticipated when insurance companies take such statements in the course of settling claims. *Id.* at 399. ““The seeds of prospective litigation have been sown, and the prudent party, anticipating this fact, will begin to prepare his case.”” *Id.* (quoting *Fireman’s Fund Ins. Co. v. McAlpine*, 120 R.I. 744, 753-54, 391 A.2d 84 (1978)).

In *Overlake Fund v. City of Bellevue*, the city’s legal counsel obtained a property appraisal to advise the city of its legal risk if it denied a building permit. *Overlake Fund v. City of Bellevue*, 60 Wn. App. 787, 791, 810 P.2d 507 (1991). The permit applicant had vaguely threatened that he would treat a denial as an unconstitutional taking.

Whether the appraisal was prepared in anticipation of litigation was a question of fact. The court remanded for an evaluation of the specific expectations of the parties at the time the appraisal was commissioned. *Id.* at 795-97.

Here, specific litigation was anticipated from the outset. The District's lawyers hired private investigator David Prescott to take witness statements for the sole purpose of preparing for that litigation—the claims by the estate and parents of the deceased child that they expected would follow and that did, in fact, follow. Lawyers do not ordinarily perform their clients' routine business functions or hire others to do so. It is clear from counsel's instructions to Mr. Prescott, moreover, that he was not expected to conduct an "objective" investigation. It was an investigation geared toward defense of the anticipated claims. And this made sense, given the District's immediately obvious legal exposure. Mr. Prescott sent his invoices not to the District but to the lawyers, and the lawyers forwarded them to the District's liability insurance carrier for payment. Liability insurers do not ordinarily pay for the preparation of administrative business reports.

Cowles is correct that any documents created by the District before the day of the field trip and simply turned over to the lawyers in anticipation of litigation were not work product. *Heidebrink*, 104 Wn.2d at 399. But the District's preexisting records are not at issue here. We are reviewing records prepared by counsel, after the fact, solely for the defense of anticipated litigation.

Cowles' argument depends on the substitution of "should have" created for "would have" created. We find no authority for the proposition that documents created by counsel in anticipation of specific litigation are not protected because the client *should have* included the information in routine administrative reports, but did not do so. In the cases cited by Cowles and amicus, Coalition for Open Government (COG), the agency did in fact prepare the disputed documents. The sole issue was whether the agency *would have* prepared them with or without impending litigation.

In *Cowles Publishing Co. v. City of Spokane*, for example, police officers filed initial mandatory reports with their supervisors of all nontraining police dog contacts that could have caused injury. *Cowles Publ'g Co. v. City of Spokane*, 69 Wn. App. 678, 849 P.2d 1271 (1993). We agreed that these initial reports should have been disclosed. Any subsequent reports or details of any later internal affairs investigation might well be exempt from public disclosure if it were apparent from the initial report that departmental policy or a criminal statute had been violated. *Id.* at 683-84.

Here, reports prepared by the District's counsel were not routine reports by District personnel. It was apparent from the outset that the question whether the District satisfied its duty of reasonable care to the deceased child or his parents was at issue, and then necessarily implicated the District policies for supervising children with these health problems, with their attendant legal implications.

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In *United States v. Adlman*, also relied on by Cowles, the Internal Revenue Service filed suit based on a corporation's creative accounting practices. *United States v. Adlman*, 68 F.3d 1495 (2d Cir. 1995). An outside accounting firm had written memos to a corporation employee who happened to be a lawyer. The memos had been prepared under a contract for general accounting services, not for legal advice. They were not then attorney work product. *Id.* at 1499.

Here, the lawyers' participation was not merely incidental, and specific litigation was anticipated.

Collins v. Mullins, cited by amicus COG, held that investigation reports mandated by internal policy were not work product. *Collins v. Mullins*, 170 F.R.D. 132 (W.D. Va. 1996). Collins sued under 42 U.S.C. § 1983 after he was roughed up by Mullins, a deputy sheriff, at the sheriff's office. The court made the sheriff turn over the witness reports to Collins. While litigation may have been anticipated, the witness reports were gathered by the sheriff in the course of an internal investigation that was mandated whenever police misconduct was alleged. They were not, then, work product. *Id.* at 133, 137. Again, *Collins* is distinguishable. The witness statements there were required by routine procedure and were prepared by the client, not by counsel.

Cowles correctly contends that CR 26(b)(4) permits a party to obtain from the litigation opponent copies of that person's own prior statements. But this has no application here. Cowles is not seeking its own prior statements. COG cites additional

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cases in which protection was sought for reports prepared by the defendant prior to the controversy. *See* COG's Br. at 10 n.31.

That is not what we have here. The trial court simply was not persuaded that an agency in the District's dire legal position would simply decide to delegate the preparation of internal, administrative investigation reports for nonlitigation purposes to lawyers instead of its own employees. That finding is well supported by this record.

Substantial Need

A civil litigant may obtain otherwise undiscoverable work product by showing a substantial need for the information and by showing that the equivalent cannot be obtained without hardship. CR 26(b)(4). "Substantial need" in the litigation context means that the information is vital to the preparation of the party's case. *Heidebrink*, 104 Wn.2d at 401.

Cowles argues that it has a substantial need because a newspaper has a duty to inform the public. And counsel's records are the sole source of this material because the District failed to generate the information in a publicly available form. The District responds that no public disclosure act request can ever satisfy the substantial need requirement of CR 26(b)(4). That is because need is "substantial" under the civil rules solely when discovery is essential to the preparation of the litigant's case. And the need for public disclosure can never rise to this level.

Amicus COG also argues that the public disclosure act work product exemption cannot be coextensive with CR 26(b)(4). Otherwise, work product could be obtained solely by parties to litigation who need the material in the preparation of their legal claims and defenses. Public disclosure act requesters could never satisfy this requirement, and all attorney work product, however innocuous, would always be exempt from all public disclosure act disclosure, contrary to the open government purpose of the act.

These arguments ignore public disclosure act provisions in favor of the court discovery rules.

The public disclosure act contains no "substantial need" requirement. Any member of the public can demand any public record from any public agency at any time for any reason, unless the *nature of the material* is such that it is protected. In this case, it would be protected even from a civil litigant who makes the required showing of need.

The material at issue here is the sort of highly protected opinion work product that would not be discoverable by a litigant. CR 26(b)(4); *Firestorm 1991*, 129 Wn.2d at 136. Absent very rare and extraordinary circumstances, discovery would not be allowed even upon a showing of substantial need. CR 26(b)(4); *Upjohn*, 449 U.S. at 401; *Pappas*, 114 Wn.2d at 211.

Cowles also obscures the difference between documents and information. The public disclosure act provides access to public documents. RCW 42.17.260. It requires

agencies to make nonexempt documents available for public inspection. It does not require agencies to provide information found in documents that are exempt from inspection.

Cowles insists it is seeking only facts. We disagree. It is true that entirely factual information may be discoverable under CR 26(b)(4) upon an appropriate showing. But CR 26(b)(4) still protects the attorneys' mental impressions, legal theories, conclusions, and opinions that might be discerned from documents supposedly containing only facts. The documents sought here are imbued with the mental impressions, legal theories, and confidential instructions of a team of lawyers and all people working under their direction defending a client.

For the same reason, we reject COG's argument that the parents of the child would have been able to obtain this material under the substantial need exception if the case had gone to trial. COG cites to *Southern Railway Co. v. Lanham*, in which a railroad's own claims agent gathered witness statements within days of an accident. *S. Ry. Co. v. Lanham*, 403 F.2d 119, 123 (5th Cir. 1968). The tort plaintiffs later demanded copies. The court found substantial need, because the immediacy value of the statements (taken right after the event) would otherwise be lost. Notes prepared by the railroad's attorneys in anticipation of the litigation were not discoverable, however. This is the holding also in *Diamond Offshore Drilling*. In *Diamond*, the plaintiff wanted transcripts of tape

recorded witness interviews prepared in anticipation of litigation by the defendant's own investigator three days after a workplace accident. *Diamond*, 168 F.R.D. at 584.

But the witness statements in *Southern Railway* and *Diamond* were never claimed to be work product. The statements were gathered by the defendant, not by counsel. Moreover, they were raw statements, not notes on the statements as we have here. *S. Ry.*, 403 F.2d at 126; *Diamond*, 168 F.R.D. at 584. The immediacy argument makes sense for tapes or transcripts. It simply falls flat when an investigator's notes are at issue. The notes may be more immediate in time. But a third party's jottings are far removed from witness statements. And, again just as importantly, the investigator's interviews were undertaken in the interest of a specific client, the District.

Irreparable Harm

COG asserts that not only does the public disclosure act have no substantial need requirement, but RCW 42.17.330 requires the agency to show irreparable harm from disclosure in every case, whether or not a counsel confidentiality exemption under RCW 42.17.310(1)(j) applies.

The plain language of the statute suggests otherwise. RCW 42.17.330 permits agencies to seek court protection without waiting for the requester to proceed with show cause on a showing of irreparable harm if no RCW 42.17.310 exemption applies. If an exemption does apply, that is all the showing we need. We may presume the legislature

created the exemption because it determined that harm to the agency would outweigh the benefit to the requester.

In sum, the substantial need exception to the court rule does not apply. The trial court correctly concluded that the documents are protected work product.

ATTORNEY-CLIENT PRIVILEGE

Besides the exemptions specified in RCW 42.17.310(1)(j), the public disclosure act also recognizes confidentiality protections found in "another statute." RCW 42.17.260(1). One of these is the attorney-client privilege set out in RCW 5.60.060(2).

The attorney-client privilege statute says:

An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

RCW 5.60.060(2)(a); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004).

Cowles contends the privilege does not apply. It urges us to follow the dissent from the recent Supreme Court decision in *Hangartner*. COG argues that counsel's notes of statements by non-District witnesses who were represented by outside counsel are not attorney-client communications and thus not protected.

Hangartner holds that the attorney-client privilege exemption "complements" the work product exemption. *Hangartner*, 151 Wn.2d at 452. Washington courts interpret RCW 5.60.060(2) as providing two-way protection of all communications and advice

between attorney and client, including communications from the attorney to the client. *Id.* (citing *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 421, 635 P.2d 708 (1981)). Moreover, we tend to use the inclusive term “privileged information” to refer to information protected under both the attorney-client privilege and the work product doctrine. *See, e.g., Firestorm 1991*, 129 Wn.2d at 135.

The attorney-client privilege for “communications and advice between attorney and client” does not extend to documents prepared for purposes other than communicating with an attorney, however. *Hangartner*, 151 Wn.2d at 452 (quoting *Kammerer*, 96 Wn.2d at 421). But documents covered by the privilege are protected regardless of whether they are “relevant to a controversy.” *Hangartner*, 151 Wn.2d at 452. The privilege applies to any information generated by a request for legal advice. *See, e.g., Dietz v. Doe*, 131 Wn.2d 835, 846, 935 P.2d 611 (1997). Amici arguing to uphold the privilege² provide examples of situations in which school districts must confide sensitive information to legal advisors. Undermining *Hangartner*, they contend, would hamstring public agencies in litigation by denying them confidential trial preparation. Amici point out that the legislature has amended the public disclosure act since *Hangartner*, and did not modify this exemption:

² Washington Schools Risk Management Pool; Washington Association of School Administrators; Washington Council of School Attorneys; Southwest Washington Risk Management Insurance Cooperative; and Washington Governmental Entity Pool.

COG cites more nongermane examples in which the privilege did not apply to a person who happened to be a lawyer but was *not* functioning as a lawyer or to a communication that was not intended to be confidential. *See In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977) (A person who happened to be an attorney did routine tax work. Communications from clients in that context were not privileged in subsequent litigation.); *United States v. Flores*, 628 F.2d 521 (9th Cir. 1980) (A lawyer represented a client in administrative proceedings that were not intended to be confidential. Communications made in that proceeding were not privileged when the client later faced criminal charges.).

These cases do not share our facts. The District's lawyers here were acting squarely in their capacity as lawyers. And all communications with the District and others were made in the shadow of impending litigation. *Hangartner* is binding precedent for us. *Halleran v. Nu W., Inc.*, 123 Wn. App. 701, 717, 98 P.3d 52 (2004). No authority is cited for the corollary proposition that a lawyer's own notes of statements of witnesses represented by counsel are not protected. Even if the witness statements themselves are not attorney-client privileged, counsel's notes of the interviews are attorney work product. *Limstrom v. Ladenburg*, 132 Wn.2d 595, 605-06, 963 P.2d 869 (1998).

All the documents here are protected under the work product doctrine. The trial court cited attorney-client privilege to complement the attorney work product doctrine. It was not necessary, but it was not incorrect.

PUBLIC POLICY

Cowles next argues that, as a matter of public policy, a public agency should not be able to sidestep a duty to disclose material simply by delegating to a private investigator and legal counsel the entire responsibility for assembling and maintaining records on matters of grave public concern. Cowles contends that if this exemption is allowed to stand, it will allow all public agencies to withhold embarrassing information simply by creating no records and turning potentially compromising incidents over to their lawyers.

The District acknowledges the need for liberal public access to information. But it also urges the need for confidential pretrial communications to maintain a level playing field for government agencies facing civil litigation. Agencies cannot otherwise balance their conflicting duties to the public. Here, the primary obligation of school districts is to educate and protect children. But they are also stewards of the public treasury.

We interpret the public disclosure act in the course of deciding cases. We may not rewrite it to add or exclude exemptions. *Hangartner*, 151 Wn.2d at 453. Moreover, we have no reason to doubt that the legislature intended the pretrial discovery exemptions to function precisely as they did here. We conclude that entrusting counsel to compile and

maintain information to which so many confidentiality interests potentially attached was not against public policy.

Public policy may sometimes require the public's right to know to yield. In the public interest, government agencies facing litigation need the protection of the civil pretrial discovery rules. Without them, the public is exposed to unlimited liability.

Here, the District reasonably and correctly perceived that litigation involving potentially enormous liability was inevitable. It was, therefore, in the public interest for the District immediately to seek legal counsel and follow the instructions of counsel. Moreover, the District faced more than its own potential tort liability. It had to protect the immediate personal needs and legal rights of the stricken family, school staff, and other profoundly affected adults, as well as other children.

Immediately seeking advice of counsel was the right thing to do. Then, as in any other case of impending major liability, it was counsel's duty to control the flow of information by closely supervising the compilation of records and guarding the confidentiality of material generated in preparation for litigation. The policies underlying the open government provisions of the public disclosure act do not outweigh the counterbalancing provisions that pretrial confidential communications be exempt from public inspection.

WAIVER

Finally, Cowles contends that the District waived any privilege when it made selected disclosures to the public and to the deceased child's family of facts discovered through the investigation conducted by counsel.

But the authority it cites for this proposition is not on point. *Brown v. City of Detroit*, for example, concerns a party who selectively leaked self-serving portions of privileged material, then tried to assert the privilege to suppress mitigating facts from trial testimony. *Brown v. City of Detroit*, 259 F. Supp. 2d 611, 623 (E.D. Mich. 2003). But that is not what happened here. Before and after this incident, the District reported what happened (a child died when he was mistakenly fed food containing peanuts) and what it did (investigated and settled the claim). This was not exempted information selectively leaked from otherwise privileged documents.

Documents released to a civil litigation adversary may lose their privileged status. But disclosing facts contained in privileged documents (in interrogatories, for instance) does not mean the other party gets the document itself. *Limstrom v. Ladenburg*, 110 Wn. App. 133, 145, 39 P.3d 351 (2002) (quoting 8 CHARLES ALAN WRIGHT & ARTHUR A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2024, at 367 (1994)).

Moreover, the work product privilege belongs to the attorney as well as to the client. *Hobley v. Burge*, 2006 U.S. App. LEXIS 449, at *8-9 (7th Cir. 2006). A client cannot waive the privilege as to the attorney. *Id.*

Finally, as a matter of policy, we cannot reconcile Cowles' waiver argument with the purpose of the public disclosure act. The idea is to achieve more open communication by government agencies, not less. If every public statement by an agency on an issue waived all of the act's exemptions, the public's access to information would be seriously curtailed by the agency's understandable reticence to say anything.

ARGUMENTS DEVELOPED BY AMICI

The court has been assisted by several amicus briefs in which the following issues were developed.

Procedure

COG argues that the District thwarted both the substance and underlying policy of the public disclosure act by taking the initiative and seeking a declaratory judgment (what COG calls a "rubber stamp" ruling). COG argues that the public disclosure act does not permit agencies to do this because the potential for abuse is too great. Agencies with unlimited public funds should not be able to haul individual people who file a request under the public disclosure act into court. Rather, the agency response is limited to denying the public disclosure act request and waiting to see whether and when the requester decides to go to court.

The trial court did not address this procedural issue, because it was moot after Cowles filed its own motion for a hearing on the merits. We mention it because it is likely to recur. *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972).

No. 23136-4-III
Soter v. Cowles Publ'g Co.

The public disclosure act has an injunction provision for agencies. RCW 42.17.330. An agency asserting an exemption may seek a judicial ruling on the merits when *either* agency functions *or* individuals would be irreparably damaged by disclosure. RCW 42.17.330. This spares the agency the uncertainty and cost of delay, including the per diem penalties for wrongful withholding. It does not prejudice the requester. It is immaterial who hauls whom into court, because the requester who prevails in *any* court action over the release of public records is entitled to attorney fees. RCW 42.17.340(4); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 271, 884 P.2d 592 (1994).

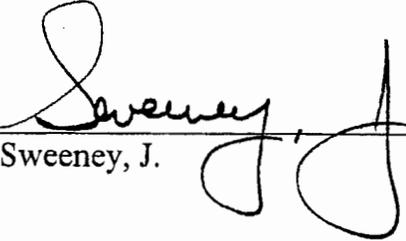
Burden Shifting

COG also argues that the District, by filing its own motion for judicial review, somehow divested itself of its burden to establish that the requested records are exempt. But nothing in the record suggests that the trial court failed to require the District to justify the claimed exemptions. As discussed above, the District satisfied its burden by showing that the material was prepared by counsel in the reasonable anticipation of litigation and that it reflects, directly or indirectly, counsel's legal theories, mental impressions, conclusions, opinions, and the like.

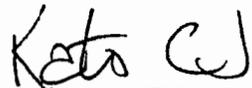
We do not consider several additional issues raised solely by amici. *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 272 n.1, 943 P.2d 1378 (1997).

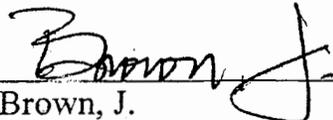
No. 23136-4-III
Soter v. Cowles Publ'g Co.

We affirm the trial judge's decision to deny Cowles access to these documents.


Sweeney, J.

WE CONCUR:


Kato, C.J.


Brown, J.

tified to Walton's reputation for violence in the community, and who testified that Walton often carried a gun. There was testimony from John McDowell, who said he saw Walton with a handgun in his vehicle shortly before the shooting. Charlie Byers testified that Walton shot at him (over his head) a few weeks prior to the shooting in question. The defendant's father testified that Berry flagged him down in his automobile some time after the shooting and gave him a handgun, which he turned over to defendant's attorneys. Phillips testified that Walton made threatening remarks to her about the defendant hours before the shooting and while he was holding a handgun. She further identified the handgun given to defendant's father by Berry as the same one she saw Walton brandish. Defendant testified that Phillips had informed him of Walton's threat, and that he feared for his safety. He further testified that when he approached Walton's vehicle that night, Walton reached for a handgun and that is why he shot Walton. Defendant also testified that Berry took a gold chain and a handgun from Walton after the shooting, and he identified the gun obtained from Berry as the same gun he saw that night.

The exclusion of Davis' testimony, even if it would have been that Walton was involved in an altercation that involved a gun, does not rise to the level of prejudice on these facts because the plenary evidence that was already before the jury, showing Walton's penchant for violence and use of a handgun. This assignment of error is without merit.

NO ERROR.

Judges TYSON and BRYANT concur.



CITY OF BURLINGTON, a Municipal Corporation, Plaintiff,

v.

BONEY PUBLISHERS, INC., d/b/a The Alamance News, Defendant.

No. COA03-904.

Court of Appeals of North Carolina.

Sept. 7, 2004.

Background: City brought declaratory judgment action against newspaper publisher, seeking a declaration that it properly held closed meeting of city council and withheld the minutes of the meeting from publisher. The Superior Court entered order approving city's actions, which was not appealed. Subsequently, the Superior Court, Alamance County, James C. Spencer, Jr., J., denied publisher's motion for partial summary judgment, which challenged city's ability to bring declaratory judgment action, and certified its order for immediate appeal. Publisher also filed petition for writ of certiorari, which the Court of Appeals granted.

Holdings: The Court of Appeals, Bryant, J., held that:

- (1) Public Records Act did not authorize city to file declaratory judgment action, and
- (2) Open Meetings Act did not authorize city to file declaratory judgment action.

Reversed.

1. Motions \Leftrightarrow 51

An order is "interlocutory" if it is entered during the pendency of an action and does not dispose of the case, but requires further action by the trial court to finally determine the rights of all the parties involved in the controversy. Rules Civ.Proc., Rule 54(a), West's N.C.G.S.A. § 1A-1.

See publication Words and Phrases for other judicial constructions and definitions.

2. Appeal and Error ⇨366

A trial court's certification of an order as immediately appealable under rule governing appeals from partial judgments is not dispositive when the order appealed from is interlocutory. Rules Civ.Proc., Rule 54(b), West's N.C.G.S.A. § 1A-1.

3. Declaratory Judgment ⇨392.1

Trial court could not certify, as immediately appealable under rule governing appeals from partial judgments, its order declaring that city was not constitutionally or statutorily barred from bringing a declaratory judgment action against newspaper publisher to resolve dispute as to city's compliance with Open Meetings Act and Public Records Act; order did not resolve any of the claims or counterclaims presented by the parties in the declaratory judgment action. West's N.C.G.S.A. § 132-1 et seq., West's N.C.G.S.A. § 143-318.9 et seq.; Rules Civ. Proc., Rule 54(b), West's N.C.G.S.A. § 1A-1(a).

4. Declaratory Judgment ⇨302.1

Public Records Act did not authorize city to file declaratory judgment action against newspaper publisher to resolve dispute as to city's compliance with Act; only the person seeking public records could initiate judicial action to enforce the request. West's N.C.G.S.A. § 132-9(a).

5. Declaratory Judgment ⇨302.1**Municipal Corporations** ⇨92

Open Meetings Act did not authorize city to file declaratory judgment action against newspaper publisher to resolve dispute as to city's compliance with Act at closed meeting of city council; only the person seeking a declaration that action of a public body was in violation of Act was entitled to initiate judicial action to enforce the request, and permitting city to bring declaratory judgment action would have chilling effect on public, thereby eliminating the protection Act was intended to provide. West's N.C.G.S.A. §§ 143-318.16, 143-318.16A(a).

On writ of certiorari to review order filed 20 November 2002 by Judge James C. Spencer, Jr. in Alamance County Superior

Court. Heard in the Court of Appeals 31 March 2004.

City Attorney Robert M. Ward; and Thomas, Ferguson & Mullins, L.L.P., by Jay H. Ferguson, for plaintiff-appellee.

Everett, Gaskins, Hancock & Stevens, L.L.P., by C. Amanda Martin, for defendant-appellant.

BRYANT, Judge.

Boney Publishers, Inc. d/b/a *The Alamance News* (defendant) appeals an order filed 20 November 2002 denying defendant's motion for partial summary judgment and declaring that the City of Burlington (plaintiff) was not constitutionally or statutorily barred from bringing a declaratory judgment action to determine whether the City was in compliance with North Carolina's open meetings and public records laws.

On 15 July 2002, the Burlington City Council (Council) met for a work session. A motion was made pursuant to N.C. Gen.Stat. § 143-318.11(a) and approved to hold a closed session allowing the Council to discuss potential and pending litigation. Jay Ashley, reporter for *The Alamance News*, and another reporter from a different organization left the meeting. Those remaining in the meeting included Council members, the city clerk, city attorney Robert Ward, private attorney Reginald Gillespie (who had been retained to represent the City in five pending lawsuits discussed during the closed session), and Alamance County Area Chamber of Commerce president Sonny Wilburn. Wilburn was present for part of the closed session in order to advise the Council and the attorneys on issues of land valuation and marketability, as these issues related to possible settlement of the pending lawsuits. The Council met for approximately 90 minutes with Wilburn present and approximately 15 minutes outside of Wilburn's presence. Wilburn left the meeting during a break. During the break, Ashley asked Ward to explain why Wilburn had been allowed to be present in a meeting called pursuant to attorney-client privilege. In his response, Ward explained that outside parties are permitted to participate in closed sessions when there is a logical reason to

include them in the meeting. Ward said he relied on a guidebook published by the Institute of Government for his position on the issue.

On 30 July 2002, Tom Boney, publisher of *The Alamance News*, attended an open meeting of the Council, where he voiced his objection to Wilburn's presence in the 15 July 2002 closed session, arguing Wilburn's presence destroyed the attorney-client privilege and rendered the purpose of the meeting void. Boney contended that the closed session was illegal and requested access to the closed session minutes. Ward responded that the closed session was held in accordance with state law. Boney was not given a copy of the minutes of the closed session.

On 14 August 2002, Boney delivered a letter to Ward, the city manager, the city clerk, and to each Council member. In his letter, Boney again stated he believed the attorney-client privilege had been destroyed by Wilburn's presence and the meeting had been improperly convened pursuant to N.C. Gen.Stat. § 143-318.11(a)(3). Boney demanded the closed session minutes and stated his willingness to pursue legal action to compel the City's compliance. Responding to Boney's letter, Ward repeated his position that outside individuals may be included in a closed session if there is a logical reason for them to be present. Ward did not articulate what logical reason justified Wilburn's presence, but provided Boney with citations to two cases: one from South Carolina and one from Texas in support of his position.

On 19 August 2002, Boney sent a second letter again requesting the minutes of the closed session. The following day (20 August 2002), Boney appeared at another Council meeting to request access to the closed session minutes. On 21 August 2002, via a letter signed by Ward, the city manager, and the city clerk, Ward responded that certain individuals had been requested to attend the closed session, and the presence of those individuals was essential in order to accomplish the purposes of the closed session. The letter also stated that the minutes would be withheld pursuant to N.C. Gen.Stat. § 143-318.10(e), until such time as public inspection

would not frustrate the purpose of the closed session.

On 22 August 2002, the City initiated a declaratory judgment action against defendant in order to resolve the conflict between the City and defendant. Defendant counter-claimed. This matter came for hearing at the 16 September 2002 civil session of Alamance County Superior Court with the Honorable James C. Spencer, Jr. presiding. The superior court framed the issue as follows:

Did the presence of a third party at the July 15, 2002 closed meeting of the Burlington City Council vitiate the asserted attorney-client privilege {N.C.G.S. 143-318.11(a)(3)} and thereby result in a violation of the North Carolina Open Meetings Law?

By order filed 25 September 2002, the superior court found that Wilburn was an agent of the City; Wilburn was present at the meeting for the purpose of facilitating the rendition of legal services; and everyone present understood the confidential nature of the closed meeting. The court concluded that the City acted properly in holding the closed session and in withholding the minutes. Defendant did not appeal from this ruling nor assign error to any portion of this order.

Defendant thereafter filed a motion for partial summary judgment "with respect to the declaratory judgment claim instituted by the plaintiff." This matter came for hearing at the 4 November 2002 civil session of Alamance County Superior Court before Judge Spencer. The court framed the issue as follows:

Was it constitutionally and statutorily permissible for the plaintiff, City of Burlington, to initiate a declaratory judgment action against the defendant, *The Alamance News*, seeking a determination of the [C]ity's rights and obligations with respect to a dispute which had arisen between the plaintiff and the defendant as to whether the City was in or out of compliance with the North Carolina Open Meetings Law and Public Records Law?

By order filed 20 November 2002, the court concluded there was no constitutional

or statutory bar to plaintiff's initiation of a declaratory judgment action seeking a determination of the City's rights and obligations with respect to whether the City was in compliance with the North Carolina Open Meetings Law and Public Records Law, and concluded defendant's motion should be denied. Defendant filed notice of appeal on 20 December 2002 from the 20 November 2002 order. The superior court granted Rule 54 certification on 21 January 2003. On 16 May 2003, this Court granted defendant's petition for writ of certiorari to review the 20 November 2002 order.

Interlocutory appeal

[1] A judgment is either interlocutory or a final determination of the rights of parties. N.C.G.S. § 1A-1, Rule 54(a) (2003); see *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). An order is interlocutory if it is entered during the pendency of an action and does not dispose of the case, but requires further action by the trial court to finally determine the rights of all the parties involved in the controversy. *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. Generally, there is no right to appeal from an interlocutory order. See N.C.G.S. § 1A-1, Rule 54(b) (2003). Our courts, however, have recognized two avenues for appealing interlocutory orders.

[2] Under Rule 54(b), when multiple claims are involved in an action and the court enters a final judgment that adjudicates one or more of the claims, such judgment, although interlocutory in nature, may be appealed if the trial judge certifies that there is no just reason for delay. N.C.G.S. § 1A-1, Rule 54(b); see *Hoots v. Pryor*, 106 N.C.App. 397, 401, 417 S.E.2d 269, 272 (1992). In this case, the trial court certified the denial of partial summary judgment as immediately appealable pursuant to Rule 54(b); however, such certification is not dispositive when the order appealed from is interlocutory. *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C.App. 242, 247, 507 S.E.2d 56, 60 (1998).

In the instant case, the trial court entered two separate orders. The first order, filed 25 September 2002, decreed:

1. The oral motion of the defendant, made at the September 16, 2002 hearing, for defendant's attorneys to be granted access to the minutes of the July 15, 2002 closed meeting of the Burlington City Council is DENIED;
2. The July 15, 2002 closed meeting of the Burlington City Council was, and is declared to have been, held in compliance with the requirements of the North Carolina Open Meetings Law;
3. The actions of the City of Burlington in denying, at the present time, access to the minutes of the July 15, 2002 closed meeting of the Burlington City Council are, and are declared to be, in compliance with the requirements of the North Carolina Public Records Law and Open Meetings Law;
4. The prayer of defendant for injunctive relief arising out of the conduct of the City of Burlington surrounding the July 15, 2002 closed meeting of the Burlington City Council is DENIED;
5. **Inasmuch as there are claims in defendant's Counterclaim not addressed at the September 16, 2002 hearing, the matter is retained for further proceedings, including any determination respecting costs and attorney fees.**

(emphasis added). Defendant *did not* appeal from this order.

Concerning the 20 November 2002 order from which defendant *did* appeal, the only issue before the superior court was whether: it [was] constitutionally and statutorily permissible for the plaintiff, City of Burlington, to initiate a declaratory judgment action against the defendant, *The Alamance News*, seeking a determination of the [C]ity's rights and obligations with respect to a dispute which had arisen between the plaintiff and the defendant as to whether the City was in or out of compliance with the North Carolina Open Meetings Law and Public Records Law?

[3] Our review of the complaint and counterclaims reveal that the 20 November 2002 order was not a final judgment as to any of the claims or counterclaims presented

by the parties. Therefore, Rule 54 certification was not properly granted as to the 20 November 2002 order. However, on 16 May 2003, this Court granted defendant's subsequent petition for writ of certiorari to review the 20 November 2002 order.

The issue on appeal is whether the Public Records Act and Open Meetings Act were designed to allow a government entity to file for declaratory judgment.

Public Records Act

[4] In *McCormick v. Hanson Aggregates Southeast, Inc.*, — N.C.App. —, 596 S.E.2d 431 (2004),¹ this Court addressed the issue of whether a governmental entity could file a declaratory action. *McCormick*, — N.C.App. at —, 596 S.E.2d at 434 (quoting N.C.G.S. § 132-9(a) (2003)) (“[a]ny person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying”). The *McCormick* Court concluded:

The North Carolina Public Records Act clearly gives the public a right to access records compiled by government agencies. See *News and Observer Publ'g Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992) (“the legislature intended to provide that, as a general rule, the public would have liberal access to public records”) (quoting *News and Observer v. State*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984)); N.C.G.S. § 132-1(b) (2003) (the public records compiled by the agencies of North Carolina government “are the property of the people”). “The Public Records Act permits public access to all public records in an agency’s possession ‘unless either the agency or the record is specifically exempted from the statute’s mandate.’” *Gannett Pacific Corp. v. N.C. State Bureau of Investigation*, — N.C.App. —, —, 595 S.E.2d 162, 164, 2004 N.C.App. LEXIS 693, at *3-4 (2004) (citing *Times-News Publishing Co. v.*

State, 124 N.C.App. 175, 177, 476 S.E.2d 450, 452 (1996)). Further, the Public Records Act does not appear to allow a government entity to bring a declaratory judgment action; only the person making the public records request is entitled to initiate judicial action to seek enforcement of its request.

McCormick, — N.C.App. at —, 596 S.E.2d at 434. The *McCormick* Court held, “based on the Public Records Act and the policy consideration for disclosure under the act . . . the use of a declaratory judgment action in the instant case was improper.” *McCormick*, — N.C.App. at —, 596 S.E.2d at 434. Likewise, we hold use of a declaratory judgment action under the Public Records Act was improper in the instant case.

Open Meetings Act

Generally, “[i]t is the policy of this State, as announced by the General Assembly, to conduct the public’s business in public.” *Boney v. Burlington City Council*, 151 N.C.App. 651, 657-58, 566 S.E.2d 701, 705-06 (2002) (“The purpose of the Open Meetings Law is ‘to promote openness in the daily workings of public bodies.’” (citation omitted)); N.C.G.S. § 143-318.9 (2003) (“Whereas the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people’s business, it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly.”).

Under certain circumstances, a public body may hold a closed meeting, N.C.G.S. § 143-318.11 (2003); however, the body is required to “keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired,” N.C.G.S. § 143-318.10(e) (2003). “Such minutes and accounts shall be public records within the meaning of the Public Records Law, G.S. 132-1 et seq.; provided, however, that minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public

1. Plaintiff’s motion for a temporary stay was

allowed by our Supreme Court on 21 June 2004.

Cite as 600 S.E.2d 877 (N.C.App. 2004)

inspection so long as public inspection would frustrate the purpose of a closed session.” N.C.G.S. § 143-318.10(e) (2003).

[5] Uniform with the Public Records Act, the Open Meetings Act does not appear to allow a government entity to bring a declaratory judgment action; only a person seeking a declaration that an action of a public body was in violation of the Open Meetings Act is entitled to initiate judicial action to seek enforcement of its request. See N.C.G.S. § 143-318.16 (2003) (“Any person may bring an action in the appropriate division of the General Court of Justice seeking such an injunction; and the plaintiff need not allege or prove special damage different from that suffered by the public at large.”); N.C.G.S. § 143-318.16A(a) (2003) (“Any person may institute a suit in the superior court requesting the entry of a judgment declaring that any action of a public body was taken, considered, discussed, or deliberated in violation of this Article . . . Any person may seek such a declaratory judgment, and the plaintiff need not allege or prove special damage different from that suffered by the public at large.”); *Eggimann v. Wake County Bd. of Educ.*, 22 N.C.App. 459, 463, 206 S.E.2d 754, 757 (1974) (stating that the “provisions of former G.S. 143-318.6 [now G.S. § 143-318.16] were intended to apply only to a situation where a citizen has been refused access to a meeting required to be open”).

Likewise, the same consideration we noted in our opinion in *McCormick* as to the propriety of a government agency bringing a declaratory judgment action as to public records, applies in the instant case to a government agency bringing a declaratory judgment action as to open meetings. Allowing a governmental agency to bring a declaratory judgment action against someone who has not initiated litigation will have a chilling effect on the public, in essence eliminating the protection offered them under the statute by requiring them “to defend civil actions they otherwise might not have commenced, . . . thus frustrating the Legislature’s purpose of furthering the fundamental right of every person . . . to have prompt access to information in the possession of public agencies.” *McCormick*, — N.C.App. at —,

596 S.E.2d at 434 (2004) (quoting *Filarsky v. Superior Court*, 28 Cal.4th 419, 423, 121 Cal. Rptr.2d 844, 845, 49 P.3d 194, 195 (2002)).

. Based on the purpose of promoting “openness in the daily workings of public bodies,” *Boney*, 151 N.C.App. at 658, 566 S.E.2d at 706 (citation omitted), and the policy consideration for disclosure under the act, it was error for the trial court to allow a public body to file a declaratory judgment action in the instant case.

Reversed.

Judges McCULLOUGH and ELMORE concur.



Hector DIAZ, Petitioner,

v.

DIVISION OF SOCIAL SERVICES and Division of Medical Assistance, North Carolina Department of Health and Human Services, Respondent.

No. COA03-1151.

Court of Appeals of North Carolina.

Sept. 7, 2004.

Background: Undocumented alien sought judicial review of decision of state Department of Health and Human Services that denied applications for Medicaid coverage. The Superior Court, Guilford County, James W. Webb, J., entered judgment reversing Department’s decision. Department appealed.

Holding: The Court of Appeals, McCullough, J., held that care provided to undocumented alien was necessary for treatment of emergency medical condition, and thus alien was entitled to Medicaid coverage. Affirmed.

Thomas A. McCORMICK, in his official capacity as City Attorney for the City of Raleigh, Plaintiff,

v.

HANSON AGGREGATES SOUTHEAST, INC., Defendant.

No. COA03-630.

Court of Appeals of North Carolina.

June 1, 2004.

Background: City attorney's office filed declaratory judgment action challenging public records request made by landowner, and landowner filed counterclaim seeking production of the requested documents. The Superior Court, Wake County, Howard E. Manning, Jr., J., ordered production of certain of the documents. Office and landowner each appealed.

Holdings: The Court of Appeals, Bryant, J., held that:

- (1) office could not institute declaratory judgment action;
- (2) office was a "public law enforcement agency," within meaning of Public Records Act;
- (3) criminal investigation exception to Act was not limited to documents relating to ongoing violations;
- (4) statute governing discovery in criminal trials in Superior Court did not limit office's disclosure obligations;
- (5) order requiring office to produce certain materials withheld on the basis of attorney-client privilege did not comport with requirements of Act; and
- (6) work product doctrine did not provide an exception to Act.

Reversed and remanded.

1. Declaratory Judgment ⇌302.1

Records ⇌52

City attorney's office could not institute declaratory judgment action challenging landowner's public record request; Public

Records Act only authorized requesting party to initiate judicial action, not government agency. West's N.C.G.S.A. § 132-9(a).

2. Records ⇌54

The Public Records Act permits public access to all public records in an agency's possession unless either the agency or the record is specifically exempted from the statute's mandate. West's N.C.G.S.A. § 132-1 et seq.

3. Records ⇌60

City attorney's office was a "public law enforcement agency," within meaning of Public Records Act and, thus, could invoke criminal investigation exception to Act; office was responsible for investigating, preventing or solving zoning violations, which constituted "violations of the law" under the Act. West's N.C.G.S.A. §§ 14-4, 132-1.4(b)(3, 4).

4. Records ⇌60, 66

Criminal investigation exception to Public Records Act was not limited to documents relating to ongoing violations, but rather included documents relating to closed and future investigations, and thus city attorney's office was not required to produce, in response to a public records request by landowner, records of criminal investigations that predated the limitations period for the zoning violations office was empowered to prosecute; rather, trial court was required to conduct in camera review of the withheld records to determine whether they were records of criminal investigations subject to the exception. West's N.C.G.S.A. § 132-1.4(b).

5. Records ⇌60

Public Records Act does not distinguish between active and inactive or closed investigations for purposes of the criminal investigation exception. West's N.C.G.S.A. § 132-1.4(b).

6. Records ⇌60

Considering the many underlying purposes for the criminal investigation exception to the Public Records Act, such as protecting investigative techniques, informant identities, and reputations of persons investigated but not charged, and encouraging citizens to volunteer information, closing an investigation

should have no effect on the status of the records of that investigation. West's N.C.G.S.A. § 132-1.4(b).

7. Records ⇌55

Statute governing discovery in criminal trials in Superior Court did not limit disclosure obligations of city attorney's office under Public Records Act, even though Act excluded from disclosure all information that would not be disclosed under that discovery statute; office had authority to prosecute only misdemeanor zoning violations, and such violations were within jurisdiction of District Court, rather than Superior Court. West's N.C.G.S.A. §§ 15A-901; 132-1.4(h)(1).

8. Records ⇌63

Trial court's order requiring city attorney's office to produce, in response to public records request by landowner, all materials withheld on the basis of attorney-client privilege that were dated more than three years before the order did not comport with the requirements of Public Records Act; Act permitted disclosure of privileged documents three years after receipt by government body, rather than three years after creation of document, and it was unclear from court's order whether it was referring to common law attorney-client privilege or the Act's narrower definition of privileged documents. West's N.C.G.S.A. § 132-1.1(a).

9. Records ⇌55

The statutory protection for privileged information under the Public Records Act is more narrow than the traditional common law attorney-client privilege. West's N.C.G.S.A. § 132-1.1(a).

10. Records ⇌57

Public Records Act provides only one exception based on privilege to its mandate of public access to public records: written statements to a public agency, by any attorney serving the government agency, made within the scope of the attorney-client privilege, and involving a claim, defense, settlement, litigation, or administrative proceeding. West's N.C.G.S.A. § 132-1.1(a).

11. Records ⇌57

Work product doctrine did not provide an exception to Public Records Act, and thus city attorney's office could not withhold documents requested by landowner on that basis; Act did not contain a general work product exception, and there was no statutory work product exception applicable to office. West's N.C.G.S.A. § 132-1(b).

12. Records ⇌54

Public Records Act grants public access to documents the Act defines as public records, absent a specific statutory exemption. West's N.C.G.S.A. § 132-1(b).

Appeal by plaintiff Thomas A. McCormick, in his official capacity as City Attorney for the City of Raleigh, and appeal by defendant from judgment filed 19 November 2002 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 26 February 2004.

City of Raleigh Attorney Thomas A. McCormick, by Associate City Attorney Dorothy K. Leapley, for plaintiff-appellant.

Kennedy Covington Lobdell & Hickman, L.L.P., by A. Lee Hogewood, III, Raleigh, for defendant-appellant.

BRYANT, Judge.

Thomas A. McCormick (the City Attorney), in his official capacity as City Attorney for the City of Raleigh, and Hanson Aggregates Southeast, Inc. (defendant) separately appeal a judgment filed 19 November 2002 ordering the partial disclosure of certain documents compiled by the City Attorney.

The City Attorney filed a complaint dated 26 June 2002 seeking a declaratory judgment from the trial court that certain documents defendant sought to obtain via a public records request on 17 June 2002 were not subject to disclosure. Defendant's public records request sought production of "all 'public records' within the meaning of G.S. § 132-1 that are in the possession or under the control of [the City Attorney's] department and that relate to the property [owned by defendant] located at 5333 Duraleigh Rd., Raleigh and commonly referred to as the Crabtree

Quarry.” The City Attorney alleged the documents (1) were protected by the rules governing attorney-client privilege and work product and (2) did not qualify as public records based on the criminal investigation exception in N.C. Gen.Stat. § 132-1.4. Background information contained in the complaint included the issuance of a 23 April 2002 order for compliance by the City of Raleigh Zoning Inspector Supervisor directing defendant “to cease removing dirt and borrow from one of the tracts owned by [defendant].” Defendant had appealed the order, and the appeal was pending before the Raleigh Board of Adjustment at the time of the filing of the declaratory judgment action. The City of Raleigh was to appear at the Board of Adjustment appellate hearing to offer evidence in support of the zoning inspector’s order.

On 19 July 2002, defendant filed its answer and counterclaim (1) confirming the City Attorney’s refusal to produce the requested documents and (2) petitioning the trial court for an order compelling the City Attorney to grant access to the requested records for inspection. The City Attorney moved for judgment on the pleadings on 21 August 2002.

In its 19 November 2002 judgment, the trial court found:

After reviewing the pleadings, as well as the relevant statutes and decisions, it appears to the Court that the City Attorney attempts to withhold records, utilizing the Criminal Investigation exception (G.S. [§] 132-1.4(3)), created from 1985 to the present, even though it is undisputed that the City has never instituted criminal charges against [defendant] or its predecessors for any alleged violation from 1985 through the present day. A zoning ordinance violation is a violation of a local ordinance and is a misdemeanor punishable under the criminal law. G.S. [§] 132-1.4(3)[,] (4) and G.S. [§] 14-4(b).

A misdemeanor must be prosecuted within two years under G.S. § 15-1, and at this point any alleged zoning ordinance violations are no longer prosecutable to the extent that they occurred more than two years ago.

(Emphasis in original). The trial court concluded that the City of Raleigh and the City Attorney qualified as a “public law enforcement agency” responsible for investigating, preventing, or solving violations of law as defined in N.C. Gen.Stat. § 132-1.4(b)(3). The trial court further concluded that the records withheld by the City Attorney pursuant to section 132-1.4 were “not public records as defined in the Public Records Law.” In exercising its discretion under N.C. Gen. Stat. § 132-1.4(a), however, the trial court ordered that those records “withheld solely on the basis of G.S. § 132-1.4 . . . which were prepared more than two years prior to October 31, 2002 be produced to [defendant] for inspection and copying.” In addition, the trial court ordered the production of “all work product or materials that were withheld by [the City Attorney] based on the attorney-client privilege **that are dated more than three years before October 31, 2002.**” (Emphasis in original). Conversely, the trial court denied production of documents: (1) related to any investigation of [defendant’s] activities by the City of Raleigh and dated October 31, 2000 or later” and (2) that “are work product or based on the statutory attorney-client privilege to the extent that those documents are dated October 31, 1999 or later.” Based on its ruling, the trial court dismissed defendant’s counterclaim as moot.

The issues are whether: (I) a declaratory judgment action in this matter was improper; (II) the criminal investigation exception to the Public Records Act applies to the City Attorney’s Office and, if so, was properly applied by the trial court; and (III) the trial court erred in its interpretation of the Public Records Act with respect to privileged material and the City Attorney’s work product.

I

Declaratory Judgment Action

[1] We first address defendant’s argument that the Public Records Act was not designed to allow a government entity to file for a declaratory judgment, thereby forcing the party making the public records request

into litigation when it has not yet sought to compel discovery through the courts. See N.C.G.S. § 132-9(a) (2003) (“[a]ny person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying”). North Carolina law is silent on the question of whether a government agency may bring a declaratory judgment action under these circumstances. However, we find the following California Supreme Court holding instructive:

Permitting a public agency to circumvent the established special statutory procedure by filing an ordinary declaratory relief action against a person who has not yet initiated litigation would eliminate statutory protections and incentives for members of the public in seeking disclosure of public records, require them to defend civil actions they otherwise might not have commenced, and discourage them from requesting records pursuant to the Act, thus frustrating the Legislature’s purpose of furthering the fundamental right of every person . . . to have prompt access to information in the possession of public agencies. Therefore, we also conclude that the superior court abused its discretion in granting declaratory relief in the action initiated by the city . . . and that the court instead should have sustained petitioner’s demurrer to the city’s complaint.

Filarsky v. Superior Court, 28 Cal.4th 419, 423-24, 121 Cal.Rptr.2d 844, 49 P.3d 194, 195 (2002).

[2] The North Carolina Public Records Act clearly gives the public a right to access records compiled by government agencies. See *News and Observer Publ’g Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992) (“the legislature intended to provide that, as a general rule, the public would have liberal access to public records”) (quoting *News and Observer v. State*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984)); N.C.G.S. § 132-1(b) (2003) (the public records compiled by the agencies of North Carolina government “are the property of the people”). “The Public Records Act permits public access to all pub-

lic records in an agency’s possession ‘unless either the agency or the record is specifically exempted from the statute’s mandate.’” *Gannett Pacific Corp. v. N.C. State Bureau of Investigation*, — N.C.App. —, —, 595 S.E.2d 162, 164 (2004) (citing *Times-News Publishing Co. v. State of North Carolina*, 124 N.C.App. 175, 177, 476 S.E.2d 450, 452 (1996)). Further, the Public Records Act does not appear to allow a government entity to bring a declaratory judgment action; only the person making the public records request is entitled to initiate judicial action to seek enforcement of its request. See N.C.G.S. § 132-9(a) (2003) (“[a]ny person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying”). We therefore hold, based on the Public Records Act and the policy consideration for disclosure under the act which are very similar to those noted by the Court in *Filarsky*, that the use of a declaratory judgment action in the instant case was improper.

However, even in the absence of the City Attorney’s declaratory judgment action, the merits of this case would have reached the trial court since defendant counterclaimed to compel disclosure. See *Jennette Fruit v. Seafare Corp.*, 75 N.C.App. 478, 482, 331 S.E.2d 305, 307 (1985) (“a counterclaim survives the dismissal of the plaintiff’s original claim”). Thus, we feel compelled to address the trial court’s ruling on the merits, as the trial court would undoubtedly enter identical findings and conclusions upon a reversal of the declaratory judgment action in conjunction with a remand by this Court on defendant’s counterclaim (previously dismissed as moot).

II

Criminal Investigation Exception

Both sides to this litigation take issue with the trial court’s application of the criminal investigation exception to the materials withheld by the City Attorney. Defendant contends the City Attorney does not qualify as a “public law enforcement agency” under the

statute, whereas the City Attorney takes issue with the trial court's application of the two-year statute of limitations for misdemeanors and contends the materials were further protected by Chapter 15A.

N.C. Gen.Stat. § 132-1.4 provides for the protection of criminal investigations and intelligence information and states in pertinent part:

(a) Records of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information compiled by public law enforcement agencies are not public records as defined by G.S. 132-1. Records of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information may be released by order of a court of competent jurisdiction.¹¹

(b) As used in this section:

- (1) "Records of criminal investigations" means all records or any information that pertains to a person or group of persons that is compiled by public law enforcement agencies for the purpose of attempting to prevent or solve violations of the law, including information derived from witnesses, laboratory tests, surveillance, investigators, confidential informants, photographs, and measurements.
- (2) "Records of criminal intelligence information" means records or information that pertain to a person or group of persons that is compiled by a public law enforcement agency in an effort to anticipate, prevent, or monitor possible violations of the law.
- (3) "Public law enforcement agency" means a municipal police department, a county police department, a sheriff's department, a company police agency commissioned by the Attorney General pursuant to G.S. 74E-1, et seq., and any State or local agency, force, de-

partment, or unit responsible for investigating, preventing, or solving violations of the law.

- (4) "Violations of the law" means crimes and offenses that are prosecutable in the criminal courts in this State or the United States and infractions as defined in G.S. 14-3.1.

N.C.G.S. § 132-1.4(a)-(b) (2003).

A

Public Law Enforcement Agency

[3] The City Attorney's Office thus qualifies as a "public law enforcement agency" for purposes of the criminal investigation exception if it carries the "responsib[ility] for investigating, preventing, or solving violations of the law."² N.C.G.S. § 132-1.4(b)(3) (2003). Because the statute applies to all "crimes and offenses that are prosecutable in the criminal courts in this State or the United States and infractions as defined in G.S. 14-3.1," violations of zoning ordinances qualify as "violations of the law." N.C.G.S. §§ 132-1.4(b)(4), 14-4 (2003) (violations of local ordinances punishable as misdemeanors); David M. Lawrence, *Public Records Law for North Carolina Local Governments* 108 (Institute of Government 1997) [hereinafter *Public Records*] ("if violation of a statute, ordinance, or regulation can cause the violator to be answerable in a criminal proceeding or in an infraction proceeding, it is a *violation of the law* as defined in G.S. 132-1.4"). As the City Attorney's Office is responsible for investigating, preventing, and solving zoning violations, *see* Raleigh City Charter § 5.6 (the City Attorney has the duty "to prosecute and defend all suits-at-law or in equity in which the City of Raleigh may become the plaintiff or defendant") and § 10-2152(4) (granting criminal enforcement powers over misdemeanors and infractions), it qualifies as a "public law enforcement agency" under section 132-1.4, *see Public Records* 108 ("any organizational unit within

1. Such discretionary disclosure of non-public records by the trial court must be governed by "one of the procedures already provided by law for discovery in civil or criminal cases." *News and Observer v. State*, 312 N.C. at 277, 322 S.E.2d at 135.

2. Contrary to defendant's assertion in its brief to this Court, this is a legal, not a factual determination.

a county or city that is responsible for enforcement of a statute, ordinance, or regulation that carries misdemeanor or infraction penalties is capable of generating records that are covered by the statute").

B

Continuing Investigation

[4] Having ruled that the criminal investigation exception to the Public Records Act is applicable to investigations conducted by the City Attorney's Office, we now turn to the City Attorney's contention that the trial court erred in ordering the production of those records "withheld solely on the basis of G.S. § 132-1.4 . . . which were prepared more than two years prior to October 31, 2002." Specifically, the City Attorney argues that, in doing so, the trial court failed to consider whether production of the material could "compromise ongoing or future investigations."

[5, 6] As is clear from the plain words of the statute, the criminal investigation exception does not apply solely to ongoing violations of the law. The statute also speaks to "attempt[s] to prevent . . . violations of the law," N.C.G.S. § 132-1.4(b)(1), (3) (2003), and "effort[s] to anticipate . . . or monitor possible violations of the law," N.C.G.S. § 132-1.4(b)(2) (2003). The statute thus contemplates situations involving investigative reports compiled prior to any actual violations. Furthermore, as observed in a publication by the North Carolina Institute of Government, North Carolina's Public Records Act "does not distinguish between active and inactive or closed investigations." *Public Records* 110. Considering the many underlying purposes for the criminal investigation exception—protecting investigative techniques, informant identities, and reputations of persons investigated but not charged, and encouraging citizens to volunteer information—"closing an investigation [should have] no effect on the status of the records of that investigation." *Public Records* 111; see also *News and Observer v. State*, 312 N.C. at 282-83, 322

S.E.2d at 138 (noting as rationale for exemption of criminal investigation reports: their common reliance on hearsay, opinions, and conclusions of investigators; the protection of investigative techniques and confidentiality of government informants; and the impairing implications for future investigations, including stifling witnesses' willingness to "respond candidly"). See also *Gannett*, — N.C.App. at —, 595 S.E.2d at 164 (holding criminal intelligence records of completed SBI investigation not public records subject to disclosure). Accordingly, we agree with the City Attorney that the trial court erred in adopting a straight-line rule through the application of the 2-year statute of limitations for misdemeanors. In light of the broad scope and purposes behind the criminal investigation exception, the trial court should have conducted an *in camera* review, as requested by the City Attorney, to properly determine, based on the purpose in compiling each withheld document and the definitions for "records of criminal investigations" and "records of criminal intelligence information" found in sections 132-1.4(b)(1)-(2), whether the material was subject to the exception.³

With respect to documents on remand that the trial court may conclude do not qualify as public records under section 132-1.4, we observe that section 132-1.4(a) grants the trial court the discretion to nevertheless disclose such documents if they could be obtained by defendant pursuant to the normal rules of discovery. See *News and Observer v. State*, 312 N.C. at 277, 322 S.E.2d at 135.

C

Chapter 15A Protections

[7] The City Attorney contends he was further entitled to the protections granted by the discovery rules of Chapter 15A governing the North Carolina Rules of Criminal Procedure. We disagree.

In addition to the provisions listed above, the criminal investigation exception to the Public Records Act provides:

3. We note that, in its brief to this Court, defendant also advocates the need for an *in camera*

review.

(h) Nothing in this section shall be construed as requiring law enforcement agencies to disclose the following:

- (1) Information that would not be required to be disclosed under Chapter 15A of the General Statutes.

N.C.G.S. § 132-1.4(h)(1) (2003). The City Attorney's Office, however, is not subject to this provision because zoning violations, prosecutable only as misdemeanors, fall within the jurisdiction of the district court. Chapter 15A, which is subject to the superior court's jurisdiction, is therefore not applicable. See N.C.G.S. § 7A-271(a) (2003) ("[t]he superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article"); N.C.G.S. § 7A-272(a) (2003) ("the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony"); N.C.G.S. § 15A-901 (2003) ("[t]his Article applies to cases within the original jurisdiction of the superior court"). Moreover, the Official Commentary to N.C. Gen. Stat. § 15A-901 notes:

As cases in district court are tried before the judge, and usually on a fairly expeditious basis, the Commission decided there was no need at present to provide for discovery procedures prior to trial in district court. As misdemeanors tried in superior court on trial de novo have already had a full trial in district court, there is little reason for requiring discovery after that trial and prior to the new trial in superior court.

This Article, then, applies to felonies and misdemeanors in the original jurisdiction of the superior court.

N.C.G.S. § 15A-901 official commentary (2003). Consequently, this assignment of error is overruled.

III

We next consider whether the trial court erred in its interpretation of the Public Records Act with respect to privileged material and the City Attorney's work product.

Privilege

[8] Defendant contends the trial court erred in failing to apply the limited attorney-client privilege outlined in N.C. Gen.Stat. § 132-1.1(a) when it denied disclosure of "attorney-client materials created within three years from October 31, 2002 in this or any other proceeding." Specifically, defendant argues the trial court: (1) did not apply the statutory factors in determining privilege for purposes of a public records request and (2) erred in setting a fixed three-year period for disclosure dating from the time of the document's creation.

[9, 10] Section 132-1.1(a) provides:

(a) Confidential Communications.—Public records, as defined in G.S. 132-1, shall not include written communications (and copies thereof) to any public board, council, commission or other governmental body of the State or of any county, municipality or other political subdivision or unit of government, made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental body, concerning any claim against or on behalf of the governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected. Such written communication and copies thereof shall not be open to public inspection, examination or copying unless specifically made public by the governmental body receiving such written communications; provided, however, that such written communications and copies thereof shall become public records as defined in G.S. 132-1 three years from the date such communication was received by such public board, council, commission or other governmental body.

N.C.G.S. § 132-1.1(a) (2003). As reiterated by our Supreme Court in *Poole*, the statutory protection for privileged information is more narrow than the traditional common law attorney-client privilege. *Poole*, 330 N.C. at 482, 412 S.E.2d at 17. According to the statute, "[t]he Public Records Law provides

only one exception [based on privilege] to its mandate of public access to public records: written statements to a public agency, by any attorney serving the government agency, made within the scope of the attorney-client privilege," and involving a claim, defense, settlement, litigation, or administrative proceeding. *Id.* at 481-82, 412 S.E.2d at 17; N.C.G.S. § 132-1.1(a).

In this case, the wording of the trial court order leaves in doubt whether the trial court meant to disclose material under the common law privilege or under the strict guidelines of section 132-1.1. In addition, the bright-line three-year-rule adopted by the trial court, focusing on the date of a document's *creation*, is contrary to the mandate of the statute providing that all confidential documents falling within the definition of the statute become subject to disclosure as a public record "three years from the date such communication was *received* by [a] public board, council, commission or other governmental body." N.C.G.S. § 132-1.1(a) (emphasis added). We therefore remand this issue to the trial court for a consideration of and ruling on the City Attorney's documents consistent with the provisions of section 132-1.1(a).

Work Product

[11] In its brief to this Court, the City Attorney, recognizing the absence of any explicit exception for work product in the Public Records Act, argues for the proposition that the common law work product rule operates as an exception to the Act.

In support of his contention, the City Attorney relies on the provision contained in N.C. Gen.Stat. § 132-1(b), stating that "it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost *unless otherwise specifically provided by law.*" N.C.G.S. § 132-1(b) (2003) (emphasis added). According to the City Attorney, the language "unless otherwise specifically provided by law" presents a clear intent by the Legislature to "incorporate[] statutory and common

law privileges into the Public Records Act, including work product immunity." We disagree with this broad reading of the statute.

[12] In *In re Decision of the State Bd. of Elections*, this Court interpreted the language of section 132-1(b) to only recognize an exception to the Public Records Act in the face of "a 'clear statutory exemption or exception' to the Act." *In re Decision of the State Bd. of Elections*, 153 N.C.App. 804, 806, 570 S.E.2d 897, 898 (2002) (quoting *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999)), *disc. review denied*, 356 N.C. 671, 577 S.E.2d 114 (2003). In other words, "North Carolina's public records act grants public access to documents it defines as 'public records,' absent a specific *statutory* exemption." *Virmani*, 350 N.C. at 465, 515 S.E.2d at 686 (citing N.C.G.S. § 132-1(b)) (emphasis added). Accordingly, in the history of the Public Records Act, only statutory, not common law exceptions have been recognized. *See, e.g., Poole*, 330 N.C. at 476, 412 S.E.2d at 14 (recognizing "personnel file" exception in N.C. Gen.Stat. § 126-22 as an exemption to the rule on disclosure of public records); *Bd. of Elections*, 153 N.C.App. at 806, 570 S.E.2d at 898 (upholding exception to Public Records Act based on specific statutory provision limiting access to election ballots). As there is "[n]o statute specifically exempt[ing] from public access materials held by a local government attorney that qualify as work product" which would apply to the City Attorney, the City Attorney's documents are not protected from disclosure as work product.⁴ *Public Records* 126.

The City Attorney, however, argues that even prior to the enactment of section 132-1(b), North Carolina case law indicated that work product immunity would trump a public record requests. The City Attorney relies on our Supreme Court's holding in *Piedmont Publg Co. v. City of Winston-Salem*, 334 N.C. 595, 434 S.E.2d 176 (1993). This unique case and its underlying policy are easily distinguished. *Piedmont* involved a public rec-

4. Exceptions for work product do exist, for example, for the Attorney General's Office. N.C.G.S. §§ 90-21.33(d), 131E-192.10(d) (2003) ("[i]n any action instituted under this section, the

work product of the Department or the Attorney General or his staff is not a public record under Chapter 132 of the General Statutes and shall not be discoverable or admissible").

ords request by a newspaper of audio tapes containing the radio transmissions of a police officer who had been fatally injured in a motor vehicle collision. *Id.* at 597-98, 434 S.E.2d at 177-78. The Supreme Court held that the rules governing discovery in criminal actions created an implicit exception to the Public Records Act and that the radio tapes fell within this exception. *Id.* The Supreme Court reasoned that, if the tapes could not be obtained by a criminal defendant under the rules for criminal discovery, they could also not be available through the use of a public records request by a third party. Otherwise, a criminal defendant whose discovery request was denied by the trial court could simply ask a third person to make a public records request so as to obtain such information notwithstanding the discovery ruling. *Id.* The Supreme Court therefore ruled that the criminal discovery rules, limiting disclosure to the State and the defendant, governed over the newspaper's public records request. *Id.* at 598, 434 S.E.2d at 178.

As the civil discovery rules protect the disclosure of both privileged material and work product, the City Attorney contends that the holding in *Piedmont* also provides an exception in the case *sub judice*. Although use of the Public Records Act in the manner described in *Piedmont* would likewise allow for circumvention of the rules of discovery in a civil case between a litigant and a government entity, the same policy implications do not apply in the civil context.

[I]f the criminal discovery laws did not create an implicit exception to the public records law, there would be no purpose whatever to the criminal discovery laws. The only material that those laws protect is material in the possession of public agencies, either law enforcement agencies or the district attorney's office; in the absence of statutory protection, all the material held by either a law enforcement agency or the district attorney is public

5. We acknowledge that this Court has previously stated that "it would be illogical to allow plaintiff to circumvent the rules of discovery in a civil context through the use of the Public Records Act." This statement, however, was made in relation to a case involving a condemnation action in which the plaintiff had asked for and was denied

record and open to public inspection. Therefore, if the rules of criminal discovery were to have any effect at all, the rules must have created an exception to the public records law; otherwise, all material subject to the rules would be public record and could be available to the defendant by that route.

The Rules of Civil Procedure, however, retain almost their full scope even if they are not held to create an implicit exception to the public records law. Most civil litigants are not governments, and therefore, even if government attorney work product is accessible under the public records law, the work product of attorneys for private litigants remains exempt from discovery or any other form of access. There remains, that is, plenty of purpose for the discovery rules in civil litigation even if those rules do not protect government litigants.

Public Records 127.

In addition to these policy considerations, we note that the decision in *Piedmont* predated the Legislature's enactment of N.C. Gen.Stat. § 132-1.4, exempting most law enforcement records from public inspection and including the Chapter 15A criminal discovery protections addressed in issue II, C. *Public Records 126.* It thus appears that, faced with the implications of the *Piedmont* holding, the Legislature chose to codify an exception to the Public Records Act for documents falling within the scope of the criminal discovery rules, *see* N.C.G.S. § 132-1.4(h)(1), but not for documents within the scope of civil discovery. This interpretation of the legislative intent underlying the Public Records Act is further bolstered by the fact that the Legislature included only a limited attorney-client privilege exception, but no work product exception in the Public Records Act. *See* N.C.G.S. § 132-1.1(a). Consequently, we conclude that the City Attorney's work product was subject to disclosure under the Act,⁵ unless, of course, the relevant docu-

discovery under the Public Records Act and the civil discovery rules, did not appeal that ruling, and later made an independent public records request. *Shella v. Moon*, 125 N.C.App. 607, 610, 481 S.E.2d 363, 365 (1997). That case thus presented a situation in which the trial court had already denied the plaintiff's right to disclosure

ments are independently exempted by virtue of the criminal investigation exception. Thus, not only was the City Attorney not entitled to greater protections than granted by the trial court's order, but the trial court erred in granting the City Attorney even limited work product protection.

Conclusion

Accordingly, the trial court's order is reversed with respect to its ruling on work product. We further remand this case to the trial court (1) to conduct an *in camera* review to determine whether materials withheld by the City Attorney are subject to the criminal investigation exception and (2) for a consideration of and ruling on the City Attorney's documents consistent with the provisions of section 132-1.1(a) on privilege.

We have reviewed the parties' remaining arguments on appeal and find them to be without merit.

Reversed and remanded.

Judges TIMMONS-GOODSON and ELMORE concur.



The TOWN OF HIGHLANDS, a North Carolina Municipal Corporation,
Plaintiff,

v.

Kathryn B. HENDRICKS, and husband, Nathan Hendricks, III, Susan B. Inman, and husband, Edward Inman; Sidney Louis McCarty, III, Mary McCarty Pressley, Margaret McCarty Early, and the Estate of Sidney Louis McCarty, Jr.; John Henry Cheatham, III, Successor Trustee of the Leila Barnes Cheatham North Carolina Residence Trust, and Leila Barnes Cheatham; Alice Monroe Nelson and L. Kent Nelson; Michael Wentz; Kalalanta Corporation, a Flori-

da Corporation; Mildred T. Johnson and Mildred Fentriss Thornton Felton; Alice Blanc Monroe Nelson and husband, L. Kent Nelson, Linda Logan Monroe, Raburn Blanc Monroe Kelly and wife, Stacey Kelly, Julian Dantzler Kelly, III, Bunrotha Limited Partnership, Moyna Blair Monroe, Diana Monroe Lewis, and J. Thomas Lewis; Bunrotha Limited Partnership, a Georgia Limited Partnership, and Malcolm Logan Monroe; and Walter Preston Evins, Samuel N. Evins, Jr. and Susan C. Evins, Defendants.

da Corporation; Mildred T. Johnson and Mildred Fentriss Thornton Felton; Alice Blanc Monroe Nelson and husband, L. Kent Nelson, Linda Logan Monroe, Raburn Blanc Monroe Kelly and wife, Stacey Kelly, Julian Dantzler Kelly, III, Bunrotha Limited Partnership, Moyna Blair Monroe, Diana Monroe Lewis, and J. Thomas Lewis; Bunrotha Limited Partnership, a Georgia Limited Partnership, and Malcolm Logan Monroe; and Walter Preston Evins, Samuel N. Evins, Jr. and Susan C. Evins, Defendants.

No. COA03-55.

Court of Appeals of North Carolina.

June 1, 2004.

Background: Town instituted condemnation actions against landowners' property. The Superior Court, Macon County, James U. Downs, J., determined that condemnation of property was for public purpose. Landowners appealed.

Holdings: The Court of Appeals, Steelman, J., held that:

- (1) escrow agreement established by town did not amount to exclusive emolument in violation of North Carolina Constitution;
- (2) direct condemnation of property was not rendered improper by fact that use of land for public purpose was contingent on several factors;
- (3) absence of written agreement between town and state Department of Transportation to transfer right-of-way obtained by town through direct condemnation proceedings did not render improper town's condemnation of property;
- (4) environmental impact statement was not necessary for town's direct condemnation of property for road widening and paving project;

therefore distinguishable from the facts of the case currently before this Court.

but it does not follow that § 4F(b) is irrelevant to the *Douglas Oil* balancing test. When the district court has before it a statute clearly evincing Congress's intent to foster cooperation with and disclosure to state governments to aid them in enforcement of federal antitrust laws, that is surely material to the public interest served by disclosure to such governments.



460 U.S. 575, 75 L.Ed.2d 295
**MINNEAPOLIS STAR AND TRIBUNE
 COMPANY, Appellant**

v.

**MINNESOTA COMMISSIONER
 OF REVENUE.**

No. 81-1839.

Argued Jan. 12, 1983.

Decided March 29, 1983.

Newspaper brought an action seeking a refund of use taxes imposed on the cost of paper and ink products consumed in the production of its publication. The District Court, Hennepin County, Minnesota, entered summary judgment in favor of the newspaper, and the State Commissioner of Revenue appealed. The Minnesota Supreme Court, 314 N.W.2d 201, reversed. The United States Supreme Court, Justice O'Connor, held that imposition of use tax on cost of paper and ink products consumed in production of publications violated the First Amendment by imposing significant burden on freedom of the press.

Reversed.

Justice Blackmun joined the opinion except footnote 12.

Justice White concurred in part and dissented in part and filed opinion.

Justice Rehnquist dissented and filed opinion.

Order on remand, 332 N.W.2d 914.

1. Taxation ⇐1212

Use tax on cost of paper and ink products consumed in production of publications was not unconstitutional under *Grosjean* decision where there was no legislative history and no indication, apart from structure of tax itself, of any impermissible or censorial motive on part of legislature. M.S.A. §§ 297A.14, 297A.24, 297A.25, subd. 1(i).

2. Constitutional Law ⇐90.1(8)

States and the federal government can subject newspapers to generally applicable economic regulations without creating constitutional problems. U.S.C.A. Const. Amend. 1.

3. Taxation ⇐1202

"Use tax" ordinarily serves to complement sales tax by eliminating incentive to make major purchases in states with lower sales taxes; it requires resident who shops out-of-state to pay use tax equal to sales tax savings.

See publication Words and Phrases for other judicial constructions and definitions.

4. Constitutional Law ⇐82(6)

Tax that burdens rights protected by First Amendment cannot stand unless burden is necessary to achieve overriding governmental interest. U.S.C.A. Const. Amend. 1.

5. Constitutional Law ⇐90(1)

Differential treatment of press, unless justified by some special characteristic of the press, suggests that goal of regulation is not unrelated to suppression of expression, and such goal is presumptively unconstitutional. U.S.C.A. Const. Amend. 1.

6. Constitutional Law ⇐90.1(1)

Differential taxation of press places such burden on interest protected by First Amendment that such treatment cannot be countenanced unless state asserts counterbalancing interest of compelling importance that it cannot achieve without differential taxation. U.S.C.A. Const. Amend. 1.

7. Constitutional Law ⇨90(1)

Regulation of press can survive only if governmental interest outweighs burden and cannot be achieved by means that do not infringe First Amendment rights as significantly. U.S.C.A. Const.Amend. 1.

8. Constitutional Law ⇨90.1(1)

Raising of revenue, standing alone, cannot justify special treatment of press, for alternative means of achieving same interest without raising concerns under First Amendment is clearly available: state could raise revenue by taxing businesses generally, avoiding censorial threat implicit in tax that singles out the press. U.S.C.A. Const.Amend. 1.

9. Constitutional Law ⇨90.1(8)**Taxation** ⇨1212

Use tax on cost of paper and ink products consumed in production of publications could not be justified as merely substitute for generally applicable sales tax, thereby avoiding First Amendment threat implicit in the use tax, where there was no explanation for choosing to use substitute for sales tax rather than sales tax itself and where permitting state to single out press for different method of taxation even if effect of burden was no different from that on other taxpayers posed too great a threat to First Amendment concerns. U.S.C.A. Const.Amend. 1; M.S.A. §§ 297A.14, 297A.24, 297A.25, subd. 1(i).

10. Constitutional Law ⇨90.1(8)**Taxation** ⇨1212

Use tax on cost of paper and ink products consumed in production of publications was unconstitutional not only because it singled out the press but also because, due to effect of exemption for first \$100,000 in ink and paper purchases, it targeted small group of newspapers. U.S.C.A. Const. Amend. 1; M.S.A. §§ 297A.14, 297A.24, 297A.25, subd. 1(i).

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the

11. Constitutional Law ⇨82(3)

Illicit legislative intent is not sine qua non of violation of First Amendment. U.S. C.A. Const.Amend. 1.

12. Constitutional Law ⇨90.1(8)**Taxation** ⇨1212

Imposition of use tax on cost of paper and ink products consumed in production of publications violated the First Amendment by imposing significant burden on freedom of the press. U.S.C.A. Const.Amend. 1; M.S.A. §§ 297A.14, 297A.24, 297A.25, subd. 1(i).

Syllabus *

While exempting periodic publications from its general sales and use tax, Minnesota imposes a "use tax" on the cost of paper and ink products consumed in the production of such a publication, but exempts the first \$100,000 worth of paper and ink consumed in any calendar year. Appellant newspaper publisher brought an action seeking a refund of the ink and paper use taxes it had paid during certain years, contending that the tax violates, *inter alia*, the guarantee of the freedom of the press in the First Amendment. The Minnesota Supreme Court upheld the tax.

Held: The tax in question violates the First Amendment. Pp. 1368-1376.

(a) There is no legislative history, and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the Minnesota Legislature in enacting the tax. *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 distinguished. P. 1369.

(b) But by creating the special use tax, which is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment. When a State so singles out the press, the political constraints that prevent a legislature from imposing crippling taxes of general applicability are weakened, and the threat of burden-

reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

some taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, thus undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. Moreover, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such goal is presumptively unconstitutional. Differential treatment of the press, then, places such a burden on the interests protected by the First Amendment that such treatment cannot be countenanced unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation. Pp. 1369-1372.

(c) Minnesota has offered no adequate justification for the special treatment of newspapers. Its interest in raising revenue, standing alone, cannot justify such treatment, for the alternative means of taxing businesses generally is clearly available. And the State has offered no explanation of why it chose to use a substitute for the sales tax rather than the sales tax itself. A rule that would automatically allow the State to single out the press for a different method of taxation as long as the effective burden is no different from that on other taxpayers or, as Minnesota asserts here, is lighter than that on other businesses, is to be avoided. The possibility of error inherent in such a rule poses too great a threat to concerns at the heart of the First Amendment. Pp. 1372-1375.

(d) Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the \$100,000 exemption is that only a handful of publishers in the State pay any tax at all, and even fewer

† Justice BLACKMUN joins this opinion except footnote 12.

1. Currently, the tax applies to sales of items for more than 9¢. Minn.Stat. § 297A.03(2) (1982).

pay any significant amount of tax. To recognize a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. Pp. 1375-1376.

314 N.W.2d 201 (Minn.1981), reversed.

Lawrence C. Brown, Minneapolis, Minn., for appellant.

Paul R. Kempainen, St. Paul, Minn., for appellee.

Justice O'CONNOR delivered the opinion of the Court.¹

This case presents the question of a State's power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers.

I

1577

Since 1967, Minnesota has imposed a sales tax on most sales of goods for a price in excess of a nominal sum.¹ Act of June 1, 1967, ch. 32, Art. XIII, § 2, 1967 Minn. Laws 2143, 2179, codified at Minn.Stat. § 297A.02 (1982). In general, the tax applies only to retail sales. *Ibid.* An exemption for industrial and agricultural users shields from the tax sales of components to be used in the production of goods that will themselves be sold at retail. § 297A.25(1)(h). As part of this general system of taxation and in support of the sales tax, see Minn.Code of Agency Rules, Tax S & U 300 (1979), Minnesota also enacted a tax on the "privilege of using, storing or consuming in Minnesota tangible personal property." This use tax applies to any nonexempt tangible personal property unless the sales tax was paid on the sales price. Minn.Stat. § 297A.14 (1982). Like the classic use tax, this use tax protects the State's sales tax by eliminating the resi-

When first enacted, the threshold amount was 16¢. Act of June 1, 1967, ch. 32, Art. XIII, § 3(2), 1967 Minn.Laws 2143, 2180.

dents' incentive to travel to States with lower sales taxes to buy goods rather than buying them in Minnesota. §§ 297A.14, 297A.24.

The appellant, Minneapolis Star & Tribune Co., "Star Tribune," is the publisher of a morning newspaper and an evening newspaper (until 1982) in Minneapolis. From 1967 until 1971, it enjoyed an exemption from the sales and use tax provided by Minnesota for periodic publications. 1967 Minn.Laws 2187, codified at Minn.Stat. § 297A.25(1)(i) (1982). In 1971, however, while leaving the exemption from the sales tax in place, the legislature amended the scheme to impose a "use tax" on the cost of paper and ink products consumed in the production of a publication. Act of Oct. 31, 1971, ch. 31, Art. I, § 5, 1971 Minn.Laws 2561, 2565, codified ¹⁵⁷⁸with modifications at Minn.Stat. §§ 297A.14, 297A.25(1)(i) (1982). Ink and paper used in publications became the only items subject to the use tax that were components of goods to be sold at retail. In 1974, the legislature again amended the statute, this time to exempt the first \$100,000 worth of ink and paper consumed by a publication in any calendar year, in effect giving each publication an annual tax credit of \$4,000. Act of May 24, 1973, ch. 650, Art. XIII, § 1, 1973 Minn. Laws 1606, 1637, codified at Minn.Stat. § 297A.14 (1982).² Publications remained exempt from the sales tax, § 2, 1973 Minn. Laws 1639.

2. After the 1974 amendment, the use tax provision read in full:

"For the privilege of using, storing or consuming in Minnesota tangible personal property, tickets or admissions to places of amusement and athletic events, electricity, gas, and local exchange telephone service purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of four percent of the sales price of sales at retail of any of the aforementioned items made to such person after October 31, 1971, unless the tax imposed by section 297A.02 [the sales tax] was paid on said sales price.

"Motor vehicles subject to tax under this section shall be taxed at the fair market value at the time of transport into Minnesota if such

After the enactment of the \$100,000 exemption, 11 publishers, producing 14 of the 388 paid circulation newspapers in the State, incurred a tax liability in 1974. Star Tribune was one of the 11, and, of the \$893,355 collected, it paid \$608,634, or roughly two-thirds of the total revenue raised by the tax. ¹⁵⁷⁹See 314 N.W.2d 201, 203, and n. 4 (1981). In 1975, 13 publishers, producing 16 out of 374 paid circulation papers, paid a tax. That year, Star Tribune again bore roughly two-thirds of the total receipts from the use tax on ink and paper. *Id.*, at 204, and n. 5.

Star Tribune instituted this action to seek a refund of the use taxes it paid from January 1, 1974, to May 31, 1975. It challenged the imposition of the use tax on ink and paper used in publications as a violation of the guarantees of freedom of the press and equal protection in the First and Fourteenth Amendments. The Minnesota Supreme Court upheld the tax against the federal constitutional challenge. 314 N.W.2d 201 (1981). We noted probable jurisdiction, 457 U.S. 1130, 102 S.Ct. 2955, 73 L.Ed.2d 1347 (1982), and we now reverse.

II

[1] Star Tribune argues that we must strike this tax on the authority of *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936). Although there are similarities between the two cases, we agree with the State that *Grosjean* is not controlling.

motor vehicles were acquired more than three months prior to its [*sic*] transport into this state.

"Notwithstanding any other provisions of section 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding \$100,000 in any calendar year, used or consumed in producing a publication as defined in section 297A.25, subdivision 1, clause (i) is subject to the tax imposed by this section." 1973 Minn.Laws 1637, codified at Minn.Stat. § 297A.14 (1982). The final paragraph was the only addition of the 1974 amendment. The provision has since been amended to increase the rate of the tax, Act of June 6, 1981, ch. 1, Art. IV, § 5, 1981 Minn.Laws 2396, but has not been changed in any way relevant to this litigation.

In *Grosjean*, the State of Louisiana imposed a license tax of 2% of the gross receipts from the sale of advertising on all newspapers with a weekly circulation above 20,000. Out of at least 124 publishers in the State, only 13 were subject to the tax. After noting that the tax was "single in kind" and that keying the tax to circulation curtailed the flow of information, *id.*, at 250-251, 56 S.Ct., at 449, this Court held the tax invalid as an abridgment of the freedom of the press. Both the brief and the argument of the publishers in this Court emphasized the events leading up to the tax and the contemporary political climate in Louisiana. See Argument for Appellees, *id.*, at 238, 56 S.Ct., at 445; Brief for Appellees, O.T. 1936, No. 303, pp. 8-9, 30. All but one of the large papers subject to the tax had "ganged up" on Senator Huey Long, and a circular distributed by Long and the Governor to each member of the state legislature described "lying newspapers" as conducting "a vicious campaign" and the tax as "a tax on lying, 2c [sic] a lie." *Id.*, at 9. Although the Court's opinion did not describe this history, it stated "[the tax] is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information," 297 U.S., at 250, 56 S.Ct., at 449, an explanation that suggests that the motivation of the legislature may have been significant.

Our subsequent cases have not been consistent in their reading of *Grosjean* on this point. Compare *United States v. O'Brien*, 391 U.S. 367, 384-385, 88 S.Ct. 1673, 1683, 20 L.Ed.2d 672 (1968) (stating that legislative purpose was irrelevant in *Grosjean*), with *Houchins v. KQED, Inc.*, 438 U.S. 1, 9-10, 98 S.Ct. 2588, 2594, 57 L.Ed.2d 553 (1978) (plurality opinion) (suggesting that purpose was relevant in *Grosjean*); *Pittsburgh Press Co. v. Pittsburgh Comm'n on*

3. Although the Minnesota Legislature records some proceedings and preserves the recordings, it has specifically provided that those recordings are not to be considered as evidence of legislative intent. See Minnesota Legislative Manual,

Human Relations, 413 U.S. 376, 383, 93 S.Ct. 2553, 2557, 37 L.Ed.2d 669 (1973) (same). Commentators have generally viewed *Grosjean* as dependent on the improper censorial goals of the legislature. See T. Emerson, *The System of Freedom of Expression* 419 (1970); L. Tribe, *American Constitutional Law* 592, n. 8, 724, n. 10 (1978). We think that the result in *Grosjean* may have been attributable in part to the perception on the part of the Court that the State imposed the tax with an intent to penalize a selected group of newspapers. In the case currently before us, however, there is no legislative history³ and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature. We cannot resolve the case by simple citation to *Grosjean*. Instead, we must analyze the problem anew under the general principles of the First Amendment.

III

[2] Clearly, the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems. See, e.g., *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139, 89 S.Ct. 927, 931, 22 L.Ed.2d 148 (1969) (antitrust laws); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-156, 72 S.Ct. 181, 187, 96 L.Ed. 162 (1951) (same); *Breard v. Alexandria*, 341 U.S. 622, 71 S.Ct. 921, 95 L.Ed. 1233 (1951) (prohibition of door-to-door solicitation); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-193, 66 S.Ct. 494, 497-98, 90 L.Ed. 614 (1946) (Fair Labor Standards Act); *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607 (1946) (same); *Associated Press v. United States*, 326 U.S. 1, 6-7, 19-20, 65 S.Ct. 1416, 1418,

Rule 1.18, Rules of the Minn. House of Representatives; Rule 65, Permanent Rules of the Senate (1981-1982). There is no evidence of legislative intent on the record in this litigation.

1424, 89 L.Ed. 2013 (1945) (antitrust laws); *Associated Press v. NLRB*, 301 U.S. 103, 132-133, 57 S.Ct. 650, 656, 81 L.Ed. 953 (1937) (National Labor Relations Act); see also *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) (enforcement of subpoenas). Minnesota, however, has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment. Although the State argues now that the tax on paper and ink is part of the general scheme of taxation, the use tax provision, quoted in n. 2, *supra*, is facially discriminatory, singling out publications for treatment that is, to our knowledge, unique in Minnesota tax law.

[3] Minnesota's treatment of publications differs from that of other enterprises in at least two important respects:⁴ it imposes a use tax that does not serve the function of protecting the sales tax, and it taxes an intermediate transaction rather than the ultimate retail sale. A use tax ordinarily serves to complement the sales tax by eliminating the incentive to make major purchases in States with lower sales taxes; it requires the resident who shops out-of-state to pay a use tax equal to the sales tax savings. *E.g.*, *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 555, 97 S.Ct. 1386, 1389, 51 L.Ed.2d 631 (1977); P. Hartman, *Federal Limitations on State and Local Taxation* §§ 10:1, 10:5 (1981); Warren & Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way*, 38 Colum.L. Rev. 49, 63 (1938). Minnesota designed its overall use tax scheme to serve this function. As the regulations state, "[t]he 'use tax' is a compensating or complementary tax." Minn.Code of Agency Rules, Tax S & U 300 (1979); see Minn.Stat. § 297A.24 (1982). Thus, in general, items exempt from the sales tax are not subject to the use tax, for, in the event of a sales tax exemption, there is no "complementary

4. A third difference is worth noting, though it may have little economic effect. The use tax is not visible to consumers, while the sales tax

function" for a use tax to serve. See *DeLuxe Check Printers, Inc. v. Commissioner of Tax*, 295 Minn. 76, 203 N.W.2d 341, 343 (1972). But the use tax on ink and paper serves no such complementary function; it applies to all uses, whether or not the taxpayer purchased the ink and paper in-state, and it applies to items exempt from the sales tax.

Further, the ordinary rule in Minnesota, as discussed above, is to tax only the ultimate, or retail, sale rather than the use of components like ink and paper. "The statutory scheme is to devise a unitary tax which exempts intermediate transactions and imposes it only on sales when the finished product is purchased by the ultimate user." *Standard Packaging Corp. v. Commissioner of Revenue*, 288 N.W.2d 234, 239 (Minn.1979). Publishers, however, are taxed on their purchase of components, even though they will eventually sell their publications at retail.

[4] By creating this special use tax, which, to our knowledge, is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment. We then must determine whether the First Amendment permits such special taxation. A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest. See, *e.g.*, *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982). Any tax that the press must pay, of course, imposes some "burden." But, as we have observed, see *supra*, at 1369, 1370, this Court has long upheld economic regulation of the press. The cases approving such economic regulation, however, emphasized the general applicability of the challenged regulation to all businesses, *e.g.*, *Oklahoma Press Publishing Co. v. Walling, supra*, 327 U.S., at 194, 66 S.Ct., at 498; *Mabee v. White Plains Publishing Co., supra*, 327 U.S., at 184, 66 S.Ct., at 514; *Associated*

must, by law, be stated separately as an addition to the price. See Minn.Stat. § 297A.03(1) (1982).

Press v. NLRB, *supra*, 301 U.S., at 132-133, 57 S.Ct., at 655-56,⁵ suggesting that a regulation that singled out the press might place a heavier burden of justification on the State, and we now conclude that the special problems created by differential treatment do indeed impose such a burden.

There is substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment.⁶ The role of the press in mobilizing ¹⁵⁸⁴ sentiment in favor of independence was critical to the Revolution. When the Constitution was proposed without an explicit guarantee of freedom of the press, the Antifederalists objected. Proponents of the Constitution, relying on the principle of enumerated powers, responded that such a guarantee was unnecessary because the Constitution granted Congress no power to control the press. The remarks of Richard Henry Lee are typical of the rejoinders of the Antifederalists:

"I confess I do not see in what cases the congress can, with any pretence of right, make a law to suppress the freedom of the press; though I am not clear, that congress is restrained from laying any duties whatever on printing, and from laying duties particularly heavy on certain pieces printed. . . ." R. Lee, Ob-

5. The Court recognized in *Oklahoma Press* that the FLSA excluded seamen and farmworkers. See 327 U.S., at 193, 66 S.Ct., at 497. It rejected, however, the publisher's argument that the exclusion of these workers precluded application of the law to the employees of newspapers. The State here argues that *Oklahoma Press* establishes that the press cannot successfully challenge regulations on the basis of the exemption of other enterprises. We disagree. The exempt enterprises in *Oklahoma Press* were isolated exceptions and not the rule. Here, everything is exempt from the use tax on ink and paper, except the press.

6. It is true that our opinions rarely speculate on precisely how the Framers would have analyzed a given regulation of expression. In general, though, we have only limited evidence of exactly how the Framers intended the First Amendment to apply. There are no recorded debates in the Senate or in the States, and the discussion in the House of Representatives was couched in general terms, perhaps in response to Madison's

servation *Leading to a Fair Examination of the System of Government*, Letter IV, reprinted in I B. Schwartz, *The Bill of Rights: A Documentary History* 466, 474 (1971).

See also *A Review of the Constitution Proposed by the Late Convention by a Federal Republican*, reprinted in 3 H. Storing, *The Complete Anti-Federalist* 65, 81-82 (1981); M. Smith, *Address to the People of New York on the Necessity of Amendments to the Constitution*, reprinted in 1 B. Schwartz, *supra*, at 566, 575-576; cf. *The Federalist* No. 84, p. 440, and n. 1 (A. Hamilton) (M. Beloff ed. 1948) (recognizing and attempting to refute the argument). The concerns voiced by the Antifederalists led to the adoption of the Bill of Rights. See 1 B. Schwartz, *supra*, at 527.

¹⁵⁸⁵ The fears of the Antifederalists were well founded. A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. See *Railway Express Agency, Inc. v. New York*, 336

suggestion that the Representatives not stray from simple acknowledged principles. See *Constitution of the United States: Analysis and Interpretation*, S.Doc. No. 92-82, p. 936, and n. 5 (1973); see also Z. Chafetz, *Freedom of Speech in the United States* 16 (1941). Consequently, we ordinarily simply apply those general principles, requiring the government to justify any burdens on First Amendment rights by showing that they are necessary to achieve a legitimate overriding governmental interest, see n. 7, *infra*. But when we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone. Prior restraints, for instance, clearly strike to the core of the Framers' concerns, leading this Court to treat them as particularly suspect. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713, 716-718, 51 S.Ct. 625, 630, 631-32, 75 L.Ed. 1357 (1931); cf. *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936) (relying on the role of the "taxes on knowledge" in inspiring the First Amendment to strike down a contemporary tax on knowledge).

U.S. 106, 112–113, 69 S.Ct. 463, 467, 93 L.Ed. 533 (1949) (Jackson, J., concurring). When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. See generally Stewart, "Or of the Press," 26 *Hastings L.J.* 631, 634 (1975). "[A]n untrammelled press [is] a vital source of public information," *Grosjean*, 297 U.S., at 250, 56 S.Ct., at 449, and an informed public is the essence of working democracy.

[5–7] Further, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional. See, e.g., *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95–96, 92 S.Ct. 2286, 2289–90, 33 L.Ed.2d 212 (1972); cf. *Brown v. Hartlage*, 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982) (First Amendment has its "fullest

7. Justice REHNQUIST's dissent analyzes this case solely as a problem of equal protection, applying the familiar tiers of scrutiny. *Post*, at 1379, 1380. We, however, view the problem as one arising directly under the First Amendment, for, as our discussion shows, the Framers perceived singling out the press for taxation as a means of abridging the freedom of the press, see n. 6, *supra*. The appropriate method of analysis thus is to balance the burden implicit in singling out the press against the interest asserted by the State. Under a long line of precedents, the regulation can survive only if the governmental interest outweighs the burden and cannot be achieved by means that do not infringe First Amendment rights as significantly. See, e.g., *United States v. Lee*, 455 U.S. 252, 257–258, 259, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982); *United States v. O'Brien*, 391 U.S. 367, 376–377, 88 S.Ct. 1673, 1678–79, 20 L.Ed.2d 672; *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).

8. Cf. *United States v. Lee*, *supra* (generally applicable tax may be applied to those with religious objections).

and most urgent" application in the case of regulation of the content of political speech). Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.⁷

IV

1586

[8] The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally,⁸ avoiding the censorial threat implicit in a tax that singles out the press.

[9] Addressing the concern with differential treatment, Minnesota invites us to look beyond the form of the tax to its substance. The tax is, according to the State, merely a substitute for the sales tax, which, as a generally applicable tax, would be constitutional as applied to the press.⁹

9. Star Tribune insists that the premise of the State's argument—that a generally applicable sales tax would be constitutional—is incorrect, citing *Follett v. McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944), *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), and *Jones v. Opelika*, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943). We think that *Breard v. Alexandria*, 341 U.S. 622, 71 S.Ct. 921, 95 L.Ed. 1233 (1951), is more relevant and rebuts Star Tribune's argument. There, we upheld an ordinance prohibiting door-to-door solicitation, even though it applied to prevent the door-to-door sale of subscriptions to magazines, an activity covered by the First Amendment. Although *Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), had struck down a similar ordinance as applied to the distribution of free religious literature, the *Breard* Court explained that case as emphasizing that the information distributed was religious in nature and that the distribution was noncommercial. 341 U.S., at 642–643, 71 S.Ct., at 932–33. As the dissent in *Breard* recognized, the majority opinion substantially undercut both *Martin* and the

1587 There are two fatal flaws in this reasoning. First, the State has offered no explanation of why it chose to use a substitute for the sales tax rather than the sales tax itself. The court below speculated that the State might have been concerned that collection of a tax on such small transactions would be impractical. 314 N.W.2d, at 207. That suggestion is unpersuasive, for sales of other low-priced goods are not exempt, see n. 1, *supra*.¹⁰ If the real goal of this tax is to duplicate the sales tax, it is difficult to see why the State did not achieve that goal by the obvious and effective expedient of applying the sales tax.

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Further, even assuming that the legislature did have valid reasons for substituting another tax for the sales tax, we are not persuaded that this tax does serve as a substitute. The State asserts that this scheme actually favors the press over other

cases now relied upon by Star Tribune, in which the Court had invalidated ordinances imposing a flat license tax on the sale of religious literature. See 341 U.S., at 649-650, 71 S.Ct., at 936 (Black, J., dissenting) ("Since this decision cannot be reconciled with the *Jones*, *Murdock* and *Martin v. Struthers* cases, it seems to me that good judicial practice calls for their forthright overruling"). Whatever the value of those cases as authority after *Breard*, we think them distinguishable from a generally applicable sales tax. In each of those cases, the local government imposed a flat tax, unrelated to the receipts or income of the speaker or to the expenses of administering a valid regulatory scheme, as a condition of the right to speak. By imposing the tax as a condition of engaging in protected activity, the defendants in those cases imposed a form of prior restraint on speech, rendering the tax highly susceptible to constitutional challenge. *Follett*, *supra*, 321 U.S., at 576-578, 64 S.Ct., at 718-19; *Murdock*, *supra*, 319 U.S., at 112, 113-114, 63 S.Ct., at 874, 875; *Jones v. Opelika*, 316 U.S. 584, 609, 611, 62 S.Ct. 1231, 1244, 1245, 86 L.Ed. 1691 (1942) (Stone, C.J., dissenting), reasoning approved on rehearing in 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943); see *Grosjean v. American Press Co.*, 297 U.S., at 249, 56 S.Ct., at 448; see generally *Near v. Minnesota*, *ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). In that regard, the cases cited by Star Tribune do not resemble a generally applicable sales tax. Indeed, our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible, *Branzburg v. Hayes*, 408 U.S. 665, 683, 92 S.Ct. 2646, 2657, 33 L.Ed.2d

businesses, because the same rate of tax is applied, but, for the press, the rate applies to the cost of components rather than to the sales price. We would be hesitant to fashion a rule that automatically allowed the State to single out the press for a different method of taxation as long as the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses. One reason for this reluctance is that the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but also with the possibility of subsequent differentially *more burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for "[t]he threat of sanctions may deter [the] exercise [of First Amend-

626 (1972) (dictum); *Grosjean v. American Press Co.*, *supra*, 297 U.S., at 250, 56 S.Ct., at 449 (dictum); cf. *Follett*, *supra*, 321 U.S., at 578, 64 S.Ct., at 719 (preacher subject to taxes on income or property) (dictum); *Murdock*, *supra*, 319 U.S., at 112, 63 S.Ct., at 874 (same) (dictum).

10. Justice REHNQUIST's dissent explains that collecting sales taxes on newspapers entails special problems because of the unusual marketing practices for newspapers—sales from vending machines and at newsstands, for instance. *Post*, at 1381. The dissent does not, however, explain why the State cannot resolve these problems by using the same methods used for items like chewing gum and candy, marketed in these same unusual ways and subject to the sales tax, see Minn.Stat. §§ 297A.01(3)(c)(vi), (viii) (1982) (defining the sale of food from vending machines as a sale); see also § 297A.04 (dealing with vending machine operators).

Further, Justice REHNQUIST fears that the imposition of a sales tax will mean that vending machine prices will be 26¢ instead of 25¢; or prices will be 30¢, with publishers retaining an extra 4¢ per paper; or the price will be 25¢, with publishers absorbing the tax. *Post*, at 1381. It is difficult to see how the use tax rectifies this problem, for it increases publishers' costs. If the increase is a penny, the use taxes forces publishers to choose to pass the exact increment along to consumers by raising the price of the finished product to 26¢; or to increase the price by a nickel and retain an extra 4¢ per paper; or to leave the price at 25¢ and absorb the tax.

ment rights] almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963).¹¹

¹⁵⁸⁹ A second reason to avoid the proposed rule is that courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation.¹² The complexities of factual economic proof always present a certain poten-

11. Justice REHNQUIST's dissent deprecates this concern, asserting that there is no threat, because this Court will invalidate any differentially more burdensome tax. *Post*, at 1381. That assertion would provide more security if we could be certain that courts will always prove able to identify differentially more burdensome taxes, a question we explore further, *infra*.

12. We have not always avoided evaluating the relative burdens of different methods of taxation in certain cases involving state taxation of the Federal Government and those with whom it does business. See *Washington v. United States*, 460 U.S. 536, 103 S.Ct. 1344, 75 L.Ed.2d 264 (1983); *United States v. County of Fresno*, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977). Since *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819), the Supremacy Clause has prohibited not only state taxation that discriminates against the Federal Government but also any direct taxation of the Federal Government. See generally *United States v. New Mexico*, 455 U.S. 720, 730-734, 102 S.Ct. 1373, 1380-82, 71 L.Ed.2d 580 (1982). In spite of the rule against direct taxation of the Federal Government, States remain free to impose the economic incidence of a tax on the Federal Government, as long as that tax is not discriminatory. *E.g., id.*, at 734-735, and n. 11, 102 S.Ct., at 1382-83, and n. 11; *United States v. County of Fresno*, *supra* 429 U.S., at 460, 97 S.Ct., at 703. In that situation, then, the valid state interest in requiring federal enterprises to bear their share of the tax burden will often justify the use of differential methods of taxation. As we explained in *Washington v. United States*, "[Washington] has merely accommodated for the fact that it may not impose a tax directly on the United States. . . ." 460 U.S., at 546, 103 S.Ct., at 1350. The special rule prohibiting direct taxation of the Federal Government but permitting the imposition of an equivalent economic burden on the Government may not only justify the State's use of different methods of taxation, but may also force us, within limits, see *Washington*, *supra*, at 546, n. 11, 103 S.Ct., at 1350, n. 11, to compare the burdens of two different taxes. Nothing, however, prevents the State from taxing the press in the same manner that it taxes other enterprises. It can achieve its interest in requiring the press to bear its share of the

tial for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes. In sum, the possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that possibility.¹³ Minnesota, therefore, has offered no adequate justification for the special treatment of newspapers.¹⁴

burden by taxing the press as it taxes others, so differential taxation is not necessary to achieve its goals.

Justice WHITE insists that the Court regularly inquires into the economic effect of taxes, relying on a number of cases arising under the Due Process Clause and the Commerce Clause. In the cases cited, the Court has struck down state taxes only when "[t]he inequality of the . . . tax burden between in-state and out-of-state manufacturer-users [was] admitted," *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70, 83 S.Ct. 1201, 1204, 10 L.Ed.2d 202 (1963), and when the Court was able to see that the tax produced a "grossly distorted result," *Norfolk & Western R. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 326, 88 S.Ct. 995, 1001, 19 L.Ed.2d 1201 (1968) (emphasis added). In these cases, the Court required the taxpayer to show "gross overreaching," recognizing "the vastness of the State's taxing power and the latitude that the exercise of that power must be given before it encounters constitutional restraints." *Ibid.*; see *Alaska v. Arctic Maid*, 366 U.S. 199, 205, 81 S.Ct. 929, 932, 6 L.Ed.2d 227 (1961). When delicate and cherished First Amendment rights are at stake, however, the constitutional tolerance for error diminishes drastically, and the risk increases that courts will prove unable to apply accurately the more finely tuned standards.

13. If a State employed the same *method* of taxation but applied a lower *rate* to the press, so that there could be no doubt that the legislature was not singling out the press to bear a more burdensome tax, we would, of course, be in a position to evaluate the relative burdens. And, given the clarity of the relative burdens, as well as the rule that differential methods of taxation are not automatically permissible if less burdensome, a lower tax rate for the press would not raise the threat that the legislature might later impose an extra burden that would escape detection by the courts, see pp. 1373-1374, and note 11, *supra*. Thus, our decision does not, as the dissent suggests, require Minnesota to impose a greater tax burden on publications.

14. Disparaging our concern with the complexities of economic proof, Justice REHNQUIST's

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V

[10] Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the \$100,000 exemption enacted in 1974 is that only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax.¹⁵ The State explains this exemption as part of a policy favoring an "equitable" tax system, although there are no comparable exemptions for small enterprises outside the press. Again, there is no legislative history supporting the State's view of the purpose of the amendment. Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested

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dissent undertakes to calculate a hypothetical sales tax liability for Star Tribune for the years 1974 and 1975. *Post*, at 1378-1379. That undertaking, we think, illustrates some of the problems that inhere in any such inquiry, see generally R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice* 461 (2d ed. 1976) (detailing some of the complexities of calculating the burden of a tax); cf. *id.*, at 475 (in evaluating excess burden of taxes, "quantitative evidence is sketchy and underlying procedures are necessarily crude"). First, the calculation for 1974 and 1975 for this newspaper tells us nothing about the relative impact of the tax on other newspapers or in other years. Since newspapers receive a substantial portion of their revenues from advertising, see generally Newsprint Information Committee, *Newspaper and Newsprint Facts at a Glance* 12 (24th ed. 1982), it is not necessarily true even for profitable newspapers that the price of the finished product will exceed the cost of inputs. Consequently, it is not necessary that a tax imposed on components is less burdensome than a tax at the same rate imposed on the price of the product. Although the relationship of Star Tribune's revenues from circulation and its revenues from advertising may result in a lower tax burden under the use tax in 1974 and 1975, that relationship need not hold for all newspapers or for all time.

Second, if, as the dissent assumes elsewhere, *post*, at 1381, the sales tax increases the price, that price increase presumably will cause a de-

crease in demand. The decrease in demand may lead to lower total revenues and, therefore, to a lower total sales tax burden than that calculated by the dissent. See generally P. Samuelson, *Economics* 381-383, 389-390 (10th ed. 1976); R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice* 21 (3d ed. 1980) ("[I]t is necessary, in designing fiscal policies, to allow for how the private sector will respond"). The dissent's calculations, then, can only be characterized as hypothetical. Taking the chance that these calculations or others like them are erroneous is a risk that the First Amendment forbids.

15. In 1974, 11 publishers paid the tax. Three paid less than \$1,000, and another three paid less than \$8,000. Star Tribune, one of only two publishers paying more than \$100,000, paid \$608,634. In 1975, 13 publishers paid the tax. Again, three paid less than \$1,000, and four more paid less than \$3,000. For that year, Star Tribune paid \$636,113 and was again one of only two publishers incurring a liability greater than \$100,000. See 314 N.W.2d, at 203-204, and nn. 4, 5.

16. Cf. *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 183, 184, 66 S.Ct. 511, 513, 514, 90 L.Ed. 607 (1946) (upholding exemption from Fair Labor Standards Act of small weekly and semiweekly newspapers where the purpose of the exemption was "to put those papers more on a parity with other small town enterprises").

VI

[11, 12] We need not and do not impugn the motives of the Minnesota Legislature in passing the ink and paper tax. Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment. See *NAACP v. Button*, 371 U.S., at 439, 83 S.Ct., at 341; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958); *Lovell v. Griffin*, 303 U.S. 444, 451, 58 S.Ct. 666, 668-69, 82 L.Ed. 949 (1938). We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment. *E.g.*, *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939). A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action. Since Minnesota has offered no satisfactory justification for its tax on the use of ink and paper, the tax violates the First Amendment,¹⁷ and the judgment below is

Reversed.

Justice WHITE, concurring in part and dissenting in part.

This case is not difficult. The exemption for the first \$100,000 of paper and ink limits the burden of the Minnesota tax to only a few papers. This feature alone is sufficient reason to invalidate the Minnesota tax and reverse the judgment of the Minnesota Supreme Court. The Court recognizes that Minnesota's tax violates the First Amendment for this reason, and I subscribe to Part V of the Court's opinion and concur in the judgment.

Having found fully sufficient grounds for decision, the Court need go no further. The question whether Minnesota or another State may impose a use tax on paper and ink that is not targeted on a small group of newspapers could be left for another day.

17. This conclusion renders it unnecessary to address Star Tribune's arguments that the \$100,000 exemption violates the principles of *Buckley*

The Court, however, undertakes the task today. The crux of the issue is whether Minnesota has justified imposing a use tax on paper and ink in lieu of applying its general sales tax to publications. The Court concludes that the State has offered no satisfactory explanation for selecting a substitute for a sales tax. *Ante*, at 1373. If this is so, that could be the end of the matter, and the Minnesota tax would be invalid for a second reason.

The Court nevertheless moves on to opine that the State could not impose such a tax even if "the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses." *Ante*, at 1374. The fear is that the government might use the tax as a threatened sanction to achieve a censorial purpose. As Justice REHNQUIST demonstrates, *post*, at 1381, the proposition that the government threatens the First Amendment by favoring the press is most questionable, but for the sake of argument, I let it pass.

Despite having struck down the tax for three separate reasons, the Court is still not finished. "A second reason" to eschew inquiry into the relative burden of taxation is presented. The Court submits that "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation," *ante*, at 1374, except, it seems, in cases involving the sovereign immunity of the United States. Why this is so is not made clear, and I do not agree that the courts are so incompetent to evaluate the burdens of taxation that we must decline the task in this case.

The Court acknowledges that in cases involving state taxation of the Federal Government and those with whom it does business, the Court has compared the burden of two different taxes. *Ante*, at 1374, n. 12. See, *e.g.*, *United States v. County of Fresno*, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977); *United States v. City*

v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 55 S.Ct. 525, 79 L.Ed. 1054 (1935).

of *Detroit*, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424 (1958). It is not apparent to me why we are able to determine whether a State has imposed the economic incidence of a tax in a discriminatory fashion upon the Federal Government, but incompetent to determine whether a tax imposes discriminatory treatment upon the press. The Court's rationale that these are a unique set of cases which nevertheless "force us" to assume a duty we are incompetent to perform is wholly unsatisfactory. If convinced of its inherent incapacity for tax analysis, the Court could have taken the path chosen today and simply prohibited the States from imposing a compensatory "equivalent" economic burden on those who deal with the Federal Government. It has not done so.

Moreover, the Court frequently has examined—without complaint—the actual effect of a tax in determining whether the State has imposed an impermissible burden ¹⁵⁹⁵ on interstate commerce or run afoul of the Due Process Clause.¹ In a number of cases concerning railroad taxes, for example, the Court considered the tax burden to decide whether it was the equivalent of a property tax or an invalid tax on interstate

commerce.² The Court has compared the burden of use taxes on competing products from sister States with that of sales taxes on products sold in-state to decide whether the former constituted discrimination against interstate commerce. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1937).³ We have also measured tax burdens in our cases considering whether state tax formulas are so out of proportion to the amount of in-state ¹⁵⁹⁶ business as to violate due process. See, e.g., *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978); *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879 (1931). In sum, the Court's professed inability to determine when a tax poses an actual threat to constitutional principles is a novel concept, and one belied by the lessons of our experience.

There may be cases, I recognize, where the Court cannot confidently ascertain whether a differential method of taxation imposes a greater burden upon the press than a generally applicable tax. In these circumstances, I too may be unwilling to entrust freedom of the press to uncertain economic proof. But, as Justice REHN-

1. See, e.g., *Alaska v. Arctic Maid*, 366 U.S. 199, 81 S.Ct. 929, 6 L.Ed.2d 227 (1961) (Alaska occupational tax collected from freezer ships at rate of 4% of value of salmon not discriminatory because Alaskan canneries pay a 6% tax on the value of salmon obtained for canning).

2. See *Norfolk & Western R. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 329, 88 S.Ct. 995, 1003, 19 L.Ed.2d 1201 (1968), (holding property tax on rolling stock based on a mileage formula violated due process) ("[W]hen a taxpayer comes forward with strong evidence tending to prove that the mileage formula will yield a grossly distorted result in a particular case, the State is obliged to counter that evidence..."); *Great Northern R. Co. v. Minnesota*, 278 U.S. 503, 509, 49 S.Ct. 191, 192, 73 L.Ed. 477 (1929) ("We find nothing in the record to indicate that the tax under consideration, plus that already collected, exceeds 'what would be legitimate as an ordinary tax on the property valued as part of a going concern, [or is] relatively higher than the taxes on other kinds of property.' *Pullman Co. v. Richardson*, 261 U.S. 330, 339 [43 S.Ct. 366, 368, 67 L.Ed. 682]"). See also *Pullman Co. v. Richardson*, 261 U.S. 330, 339, 43 S.Ct. 366, 368, 67 L.Ed. 682 (1923); *Cudahy Packing Co. v.*

Minnesota, 246 U.S. 450, 453-455, 38 S.Ct. 373, 374-75, 62 L.Ed. 827 (1918); *United States Express Co. v. Minnesota*, 223 U.S. 335, 32 S.Ct. 211, 56 L.Ed. 459 (1912); *Galveston, H. & S. A. R. Co. v. Texas*, 210 U.S. 217, 28 S.Ct. 638, 52 L.Ed. 1031 (1908).

3. In *Henneford*, a 2% tax was imposed on the privilege of using products coming from other States. Excepted from the tax was any property, the sale or use of which had already been subjected to an equal or greater tax. The Court, speaking through Justice Cardozo, upheld the use tax, noting that "[w]hen the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates." 300 U.S., at 583-584, 57 S.Ct., at 527-28. See also *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202 (1963) (holding use tax burden went beyond sales tax and constituted invalid discriminatory burden on commerce); *Scripto v. Carson*, 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960) (upholding use tax as complement to sales tax).

QUIST clearly shows, *post*, at 1378-1379, this is not such a case. Since it is plainly evident that Minneapolis Star is not disadvantaged and is almost certainly benefited by a use tax vis-à-vis a sales tax, I cannot agree that the First Amendment forbids a State to choose one method of taxation over another.

Justice REHNQUIST, dissenting.

Today we learn from the Court that a State runs afoul of the First Amendment proscription of laws "abridging the freedom of speech, or of the press" where the State structures its taxing system to the advantage of newspapers. This seems very much akin to protecting something so overzealously that in the end it is smothered. While the Court purports to rely on the intent of the "Framers of the First Amendment," I believe it safe to assume that in 1791 "abridge" meant the same thing it means today: to diminish or curtail. Not until the Court's decision in this case, nearly two centuries after adoption of the First Amendment, has it been read to prohibit activities which in no way diminish or curtail the freedoms it protects.

I agree with the Court that the First Amendment does not *per se* prevent the State of Minnesota from regulating the press even though such regulation imposes an economic burden. It is evident from the numerous cases relied on by the Court, which I need not repeat here, that this principle has been long settled. *Ante*, at 1369-1370. I further agree with the Court that application of general sales and use taxes to the press would be sanctioned under this line of cases. *Ante*, at 1373, n. 9. Therefore, I also agree with the Court to the extent it holds that any constitutional attack on the Minnesota scheme must be aimed at the classifications used in that taxing scheme. *Ante*, at 1371. But it is at

* The sales tax exemption and use tax liability are not, strictly speaking, for newspapers alone. The term of art used in the Minnesota taxing scheme is "publications." Publications is defined to include such materials as magazines,

this point that I part company with my colleagues.

The Court recognizes in several parts of its opinion that the State of Minnesota could avoid constitutional problems by imposing on newspapers the 4% sales tax that it imposes on other retailers. *Id.*, at 1372-1375 and nn. 9, 13. Rather than impose such a tax, however, the Minnesota legislature decided to provide newspapers with an exemption from the sales tax and impose a 4% use tax on ink and paper; thus, while both taxes are part of one "system of sales and use taxes," 314 N.W.2d 201, 203 (1981), newspapers are classified differently within that system.* The problem the Court finds too difficult to deal with is whether this difference in treatment results in a significant burden on newspapers.

The record reveals that in 1974 the Minneapolis Star & Tribune had an average daily circulation of 489,345 copies. *Id.*, at 203-204, nn. 4 and 5. Using the price we were informed of at argument of 25¢ per copy, see Tr. of Oral Arg. at 46, gross sales revenue for the year would be \$38,168,910. The Sunday circulation for 1974 was 640,756; even assuming that it did not sell for more than the daily paper, gross sales revenue for the year would be at least \$3,329,828. Thus, total sales revenues in 1974 would be \$46,498,738. Had a 4% sales tax been imposed, the Minneapolis Star & Tribune would have been liable for \$1,859,950 in 1974. The same "complexities of factual economic proof" can be analyzed for 1975. Daily circulation was 481,789; at 25¢ per copy, gross sales revenue for the year would be \$37,579,542. The Sunday circulation for 1975 was 619,154; at 25¢ per copy, gross sales revenue for the year would be \$8,049,002. Total sales revenues in 1975 would be \$45,628,544; at a 4% rate, the sales tax for 1975 would be \$1,825,142. Therefore, had the sales tax been imposed, as the Court agrees would have been per-

advertising supplements, shoppers guides, house organs, trade and professional journals, and serially issued comic books. See Minn.Stat. § 331.02 (1982); 13 Minn.Code of Agency Rules, Tax S & U 409(b) (1979).

missible, the Minneapolis Star & Tribune's liability for 1974 and 1975 would have been \$3,685,092.

The record further indicates that the Minneapolis Star & Tribune paid \$608,634 in use taxes in 1974 and \$636,113 in 1975—a total liability of \$1,244,747. See 314 N.W.2d, at 203–204, nn. 4 and 5. We need no expert testimony from modern day Euclids or Einsteins to determine that the \$1,244,747 paid in use taxes is significantly less burdensome than the \$3,685,092 that could have been levied by a sales tax. *A fortiori*, the Minnesota taxing scheme which singles out newspapers for “differential treatment” has benefited, not burdened, the “freedom of speech, [and] of the press.”

Ignoring these calculations, the Court concludes that “differential treatment” alone in Minnesota’s sales and use tax scheme requires that the statutes be found “presumptively unconstitutional” and declared invalid “unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.” *Ante*, at 1372. The “differential treatment” standard that the Court has conjured up is unprecedented and unwarranted. To my knowledge this Court has never subjected governmental action to the most stringent constitutional review solely on the basis of “differential treatment” of particular groups. The case relied on by the Court, *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95–96, 92 S.Ct. 2286, 2289–90, 33 L.Ed.2d 212 (1972), certainly does not stand for this proposition. In *Mosley* all picketing except “peaceful picketing” was prohibited within a particular public area. Thus, “differential treatment” was not the key to the Court’s decision; rather the essential fact was that unless a person was considered a “peaceful picketer” his speech through this form of expression would be totally abridged within the area.

Of course, all governmentally created classifications must have some “rational basis.” See *Williamson v. Lee Optical*

Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949). The fact that they have been enacted by a presumptively rational legislature, however, arms them with a presumption of rationality. We have shown the greatest deference to state legislatures in devising their taxing schemes. As we said in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959):

“The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. . . . The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. [Citations omitted.] “To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government. . . .” *Id.*, at 526–527, 79 S.Ct., at 440 (quoting *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159, 50 S.Ct. 310, 314, 74 L.Ed. 775 (1930)).

See also *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70, 67 S.Ct. 1062, 91 L.Ed. 1346 (1947); *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940); *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87, 55 S.Ct. 333, 79 L.Ed. 780 (1935); *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 58 S.Ct. 721, 82 L.Ed. 1024 (1938).

Where the State devises classifications that infringe on the fundamental guarantees protected by the Constitution the Court has demanded more of the State in

justifying its action. But there is no *infringement*, and thus the Court has never required more, unless the State's classifications *significantly burden* these specially protected rights. As we said in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976) (*per curiam*) (emphasis added), "equal protection analysis requires strict scrutiny of a legislative classification only when the classification *impermissibly interferes* with the exercise of a fundamental right...." See also *California Medical Assn. v. FEC*, 453 U.S. 182, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981); *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977); *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); *American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). To state it in terms of the freedoms at issue here, no First Amendment issue is raised unless First Amendment rights have been infringed; for if there has been no infringement, then there has been no "abridgment" of those guarantees. See *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).

Today the Court departs from this rule, refusing to look at the record and determine whether the classifications in the Minnesota use and sales tax statutes significantly burden the First Amendment rights of appellant and its fellow newspapers. The Court offers as an explanation for this failure the self-reproaching conclusion that "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes. In sum, the possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment, and we cannot toler-

ate that possibility. Minnesota, therefore, has offered no adequate justification for the special treatment of newspapers." *Ante*, at 1374-1375 (footnotes omitted).

Considering the complexity of issues this Court resolves each Term, this admonition as a general rule is difficult to understand. Considering the specifics of this case, this confession of inability is incomprehensible.

Wisely not relying solely on its inability to weigh the burdens of the Minnesota tax scheme, the Court also says that even if the resultant burden on the press is lighter than on others

"the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but also with the possibility of subsequent differentially *more burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for '[t]he threat of sanctions may deter [the] exercise [of First Amendment rights] almost as potently as the actual application of sanctions.'" *Ante*, at 1374.

Surely the Court does not mean what it seems to say. The Court should be well aware from its discussion of *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), that this Court is quite capable of dealing with changes in state taxing laws which are intended to penalize newspapers. As Justice Holmes aptly put it: "[T]his Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223, 48 S.Ct. 451, 453, 72 L.Ed. 857 (1928) (dissenting opinion). Furthermore, the Court itself intimates that if the State had employed "the same *method* of taxation but applied a lower *rate* to the press, so that there could be no doubt that the legislature was not singling out the

1602 press to bear a more burdensome tax" the taxing scheme would be constitutionally permissible. *Ante*, at 1375, n. 13. This obviously has the same potential for "the threat of sanctions," because the legislature could at any time raise the taxes to the higher rate. Likewise, the newspapers' absolute exemption from the sales tax, which the Court acknowledges is used by many other States, would be subject to the same attack; the exemption could be taken away.

The State is required to show that its taxing scheme is rational. But in this case that showing can be made easily. The Court states that "[t]he court below speculated that the State might have been concerned that collection of a [sales] tax on such small transactions would be impractical." *Ante*, at 1373. But the Court finds this argument "unpersuasive," because "sales of other low-priced goods" are subject to the sales tax. *Ibid.* I disagree. There must be few such inexpensive items sold in Minnesota in the volume of newspaper sales. Minneapolis Star & Tribune alone, as noted above, sold approximately 489,345 papers every weekday in 1974 and sold another 640,756 papers every Sunday. In 1975 it had a daily circulation of 481,789 and a Sunday circulation of 619,154. Further, newspapers are commonly sold in a different way than other goods. The legislature could have concluded that paperboys, corner newsstands, and vending machines provide an unreliable and unsuitable means for collection of a sales tax. Must everyone buying a paper put 26¢ in the vending machine rather than 25¢; or should the price of a paper be raised to 30¢, giving the paper 4¢ more profit; or should the price be kept at 25¢ with the paper absorbing the tax? In summary, so long as the State can find another way to collect revenue from the newspapers, imposing a sales tax on newspapers would be to no one's advantage; not the newspaper and its distributors who would have to collect the tax, not the State who would have to enforce collection, and not the consumer who would have to pay for the paper in odd

amounts. The reasonable alternative Minnesota chose was to impose the use tax on ink and paper. "There is no reason 1603 to believe that this legislative choice is insufficiently tailored to achieve the goal of raising revenue or that it burdens the first amendment in any way whatsoever." 314 N.W.2d, at 207. Cf. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981).

The Court finds in very summary fashion that the exemption newspapers receive for the first \$100,000 of ink and paper used also violates the First Amendment because the result is that only a few of the newspapers actually pay a use tax. I cannot agree. As explained by the Minnesota Supreme Court, the exemption is in effect a \$4,000 credit which benefits all newspapers. 314 N.W.2d, at 203. Minneapolis Star & Tribune was benefited to the amount of \$16,000 in the two years in question; \$4,000 each year for its morning paper and \$4,000 each year for its evening paper. *Ibid.* Absent any improper motive on the part of the Minnesota Legislature in drawing the limits of this exemption, it cannot be construed as violating the First Amendment. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 194, 66 S.Ct. 494, 498, 90 L.Ed. 614 (1946). Cf. *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607 (1946). The Minnesota Supreme Court specifically found that the exemption was not a "deliberate and calculated device" designed with an illicit purpose. 314 N.W.2d, at 208. There is nothing in the record which would cast doubt on this conclusion. The Minnesota court further explained:

"[I]t is necessary for the legislature to construct economically sound taxes in order to raise revenue. In order to do so, the legislature must classify or grant exemptions to insure that the burden upon the taxpayer in paying the tax or upon the state in collecting the tax does not outweigh the benefit of the revenues to the state. Traditionally classification has been a device for fitting tax pro-

grams to local needs and usages in order to achieve an equitable distribution of the tax burden.' *Madden v. Kentucky*, 309 U.S. 83, 88 [60 S.Ct. 406, 408, 84 L.Ed. 590] (1940)." *Id.*, at 209-210.

1604 | There is no reason to conclude that the State, in drafting the \$4,000 credit, acted other than reasonably and rationally to fit its sales and use tax scheme to its own local needs and usages.

To collect from newspapers their fair share of taxes under the sales and use tax scheme and at the same time avoid abridging the freedoms of speech and press, the Court holds today that Minnesota must subject newspapers to millions of additional dollars in sales tax liability. Certainly this is a hollow victory for the newspapers, and I seriously doubt the Court's conclusion that this result would have been intended by the "Framers of the First Amendment."

For the reasons set forth above, I would affirm the judgment of the Minnesota Supreme Court.



460 U.S. 605, 75 L.Ed.2d 318
State of ARIZONA, Plaintiff
 v.
State of CALIFORNIA et al.
 No. 8, Orig.
 Argued Dec. 8, 1982.
 Decided March 30, 1983.

In an original action to determine States' and other parties' rights to the waters of the Colorado River, Indian tribes whose water rights had been litigated by the intervenor United States moved to intervene, seeking to have those water rights increased to account for irrigable lands within recognized reservation boundaries for which water rights were not claimed in the earlier litigation, and "boundary lands," irrigable lands claimed to have been

finally determined to lie within the reservations. On States' exceptions to the report of a special master, the Supreme Court, Justice White, held that: (1) the tribes were entitled to intervene; (2) principles of res judicata advised against reopening the calculation of the amount of practicably irrigable acreage to which the tribes were entitled; and (3) a provision of the earlier decree that the reservations' water rights were subject to appropriate adjustment by agreement or decree in the event "the boundaries of the respective reservations were finally determined," did not preclude challenge to boundary determinations made ex parte by the Secretary of the Interior, but did preclude challenge to boundaries determined by judicial decree in certain quiet title actions.

Exceptions sustained in part and overruled in part, and motions to intervene granted.

Justice Brennan filed an opinion concurring in part and dissenting in part in which Justice Blackmun and Justice Stevens joined.

See also 439 U.S. 419, 99 S.Ct. 995, 58 L.Ed.2d 627.

1. Federal Courts ⇌443

In original action in Supreme Court to determine rights to waters of Colorado River, in which United States had intervened seeking water rights on behalf of Indian tribes, allowing tribes to intervene subsequent to initial adjudication of their water rights did not violate Eleventh Amendment rights of States involved, since tribes did not seek to bring any new claims or issues against States, but only sought to participate under adjudication of their water rights that was commenced by United States. U.S.C.A. Const.Amend. 11.

2. Federal Courts ⇌443

Federal rules are only guide to procedure in original action in Supreme Court. Fed.Rules Civ.Proc. Rule 24, 28 U.S.C.A.