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No. 78574-1

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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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COWLES PUBLISHING COMPANY, a Washington corporation,

Appellant,

v.

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

Respondents.

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**SUPPLEMENTAL BRIEF OF RESPONDENT  
SPOKANE SCHOOL DISTRICT NO. 81**

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## **I. IDENTITY OF RESPONDENT**

This Supplemental Brief is submitted by Respondent Spokane School District No. 81 (the School District or the District). The School District is a public agency operating under the laws of the State of Washington and is therefore subject to the Washington Public Records Act, Chapter 42.56 RCW.<sup>1</sup>

## **II. DISCUSSION**

This was an easy case below. It was easy because under the overwhelming and extremely unique factual record of this case, the result reached by the trial court and the Court of Appeals was mandated by a plainly-applicable limitation on the reach of the PRA that our public's elected representatives deemed wise and necessary to the protection of interests that are vital to the public.<sup>2</sup>

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<sup>1</sup> Effective July 1, 2006, a few months after the Court of Appeal's decision in this case, the Public Records Act (previously denominated by the legislature as the "Public Disclosure Act,"), was renamed as such, removed from Chapter 42.17 RCW, and with respect to all provisions pertinent to this review identically recodified at Chapter 42.56 RCW. For consistency with prior briefing in the Court of Appeals and this court, the School District here will nevertheless continue using references to the Chapter 42.17 RCW codification in effect at the time of the decision below (though cross-references to the new codification locations of those provisions of the Act cited in this Brief are set forth in the Table of Contents). However the School District does herein adopt the new convention of referencing the statute as the "Public Records Act," abbreviated as PRA.

Further with respect to abbreviated citation form herein, the School District herein refers to the decision of the Court of Appeals being reviewed as "Opinion."

<sup>2</sup> Whereas the PRA's principle purpose is, obviously, to provide the people of our state an effective vehicle to obtain information as to how their own governmental business is being conducted, the legislature further determined, as a countervailing factor, that certain limitations on access are necessary to avoid harm to the public's interests. *See* RCW 42.17.010(11) (in setting forth the public access purposes of the PRA, the legislature was at the same time "mindful of the right of individuals to privacy and of the desirability of the

A. **The Legislature Has Afforded To Public Agencies Work Product and Attorney-Client Privilege Protections That Are Coextensive With Those Enjoyed By Their Private Litigant Adversaries.**

By the PRA's "controversy" exemption at RCW 42.17.310(1)(j), our legislature determined it is necessary to the protection of the public's interest to exempt from public disclosure any document that a government agency or its representatives generated in relation to a controversy, if but to the same extent that that document would be protected from disclosure under our state's civil discovery rules. Our courts have uniformly held that the legislature therefore intended by the controversy exemption to incorporate for governmental agencies the full non-disclosure benefits of the work product doctrine – specifically as the doctrine is set forth in Civil Rule 26(b)(4). *See, e.g., Limstrom v. Ladenburg*, 136 Wn.2d 595, 613, 963 P.2d 869 (1998). And our courts have likewise held the controversy exemption additionally incorporates the protective benefits of the attorney-client privilege for government agencies and their employees and representatives, by a scope within the PRA context that is at least coextensive with that privilege's application in civil litigation discovery. *E.g., Harris v. Pierce County*, 84 Wn. App. 222, 234-35, 928 P.2d

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efficient administration of government..."). Thus, the enactment of the 80-plus exemptions to public disclosure expressly listed at RCW 42.17.310 – including the "controversy" exemption here at issue, at .310(1)(j).

111 (1996); see also *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004).<sup>3</sup>

The public-interest reason for the legislature’s grant of a public-disclosure exemption for government agencies’ work product and attorney-client privileged materials is obvious. If those agencies and their employees, representatives, and attorneys cannot know with confidence that their most intimate written communications of matters bearing on legal disputes in which they are embroiled, and their most intimate legal strategy and litigation-investigation materials, will forever be protected from disclosure – i.e., before, during, and after litigation – to the same extent as those generated by their private party litigation opponents, then the playing field of our adversary

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<sup>3</sup> With respect to attorney-client privilege, it is worth noting that this case is not even one like *Hangartner v. City of Seattle*, *supra*. In *Hangartner*, this Court held that the attorney-client privilege statute, RCW 5.60.060(2), protects written attorney-client communications from disclosure under the PRA even when the exemption of RCW 42.17.310(1)(j) cannot apply because the writings were not generated in relation to a “controversy.” *Hangartner*, 151 Wn.2d at 451-53.

Unlike in *Hangartner*, here, there is not even basis for intellectually honest argument as to whether the documents at issue were generated in relation to a “controversy.” For purposes of RCW 42.17.310(1)(j), a “controversy” existed at the time a document was generated if, at that time, there was “completed, existing, or **reasonably anticipated** litigation.” *Guillen v. Pierce County*, 144 Wn.2d 696, 713, 31 P.3d 628 (2001) (emphasis added); see also *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993).

Here literally within minutes of Nathan’s death, the School District’s superintendent, its chief legal officer, and its attorneys (who served as both the District’s general legal counsel and as its standing tort insurance defense counsel) actually anticipated very substantial wrongful death litigation against the District. And that such anticipation was objectively reasonable, under the facts communicated from the hospital to the District’s chief legal officer within minutes of Nathan’s death, is indisputable. Indeed, in setting what may be a dubious record for timeliness of civil claim-assertion in this state, an attorney appeared for Nathan’s family and asserted a claim against the District within *three business days* of Nathan’s death.

system of civil litigation would be tilted disastrously against governmental entities.

When a communication is confidential and concerns contemplated or pending litigation..., **the necessity for the attorney-client privilege exists as between a public agency and its lawyers to as great an extent as it exists between other clients and their counsel.**

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Settlement and avoidance of litigation are particularly sensitive activities, whose conduct would be grossly confounded, often made impossible, by indiscriminating insistence on open lawyer-client conferences. In settlement advice, the attorney's professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears. **If the public's 'right to know' compelled admission of an audience, the ringside seats would be occupied by the government's adversary, delighted to capitalize on every revelation of weakness.** . . . Frustration would blunt the law's policy in favor of settlement, and financial imprudence might be a compelled path.

*Port of Seattle v. Rio*, 16 Wn.App. 718, 725, 559 P.2d 18 (1977). These observations by then-Judge Callow have equal force in the context of the work product doctrine as in the attorney-client privilege context.

In short, when it repealed sovereign immunity over four decades ago, and at all times since, our legislature has evidenced no other intention than to put governmental entities on an *equal footing* with their private party adversaries in civil litigation. Much less, at the time of repeal of sovereign immunity or since, has our legislature ever shown the slightest intention to

burden our governmental agencies with lesser work product or attorney-client privilege rights than those enjoyed by their private party adversaries, in civil litigation. Indeed, by our legislature’s unwavering commitment to the controversy exemption of RCW 42.17.310(1)(j), the opposite is so.<sup>4</sup>

Yet the existence of lesser attorney-client privilege and work product doctrine protections for government agencies than is enjoyed by their private civil litigation counterparts is precisely what Cowles and the media amici here suggest is the law of this state. Indeed their principal argument – made with no supporting legal authority – is that Cowles’ desire to publish news stories with new and different facts concerning Nathan’s death constitutes a “substantial need” that justifies invading the School District’s most intimate work-product and attorney-client privileged materials.

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<sup>4</sup> In fact, since this Court’s 2004 decision in *Hangartner, supra*, our legislature has twice been specifically asked to revisit and statutorily diminish the scope of protection given to government agencies’ privileged materials under the PRA. Specifically, in each of the two sessions following *Hangartner*, sections of bills specifically designed to restrict the scope of *Hangartner*’s holdings concerning attorney-client privilege were introduced, but failed to make it out of their respective committees. *See, e.g.*, S.B. 5735 (2005); H.B. 1758 (2005); H.B. 2515 (2006); H.B. 1350 (2006). The Legislature’s refusal to diminish the protective treatment given an agency’s privileged materials must be taken as an endorsement of the current provisions of the PRA and our appellate courts’ application of them. *See Soproni v. Polygon Apt. Partners*, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999); *Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992) (“Because the statutory language...has remained unchanged since the time of this court’s decision..., we are not persuaded that we should overrule clear precedent of this court interpreting the same statutory language.”); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 789, 719 P.2d 531 (1986) (“Legislative inaction in this instance indicates legislative approval....”).

The District submits the taking of this astounding position by Cowles and its media amici merely typifies that the reason they have pursued this appeal is that they simply take political issue with the legislature's considered PRA enactments, because the result the legislature has so obviously mandated for this case runs counter to the extremist "absolute transparency in government" bent that media interests possess.

Respectfully, the School District submits that this courts should not wade into that political debate. This court is urged by the District to honor and enforce the statutory balance our elected representatives have concertedly seen fit to strike, for the benefit of the citizenry sought to be aided by the PRA, and to direct Cowles and its media amici to the legislature to attempt further lobbying in hopes of achieving the result they seek.

**B. Substantial Evidence Easily Supported the Trial Court's and the Court of Appeals' Determination That the Materials Were In No Respect Prepared as "Ordinary Course of Business Administrative Safety Investigation" Records.**

If a "classic" tort-defense investigation ever was performed and put before the courts of this state for review – in other words, an investigation performed for the *precise, sole, and urgent* purpose of resisting anticipated civil litigation – the record below overwhelmingly establishes that the investigation performed here, by the District's insurance-defense counsel, and by their

retained investigator, working precisely at their direction and control, is that classic case.

Despite that conclusive factual record, Cowles and the media amici continue to suggest that the trial court and the Court of Appeals should have disregarded that record (and the dispositive inference that the disputed documents themselves, based on *in camera* review, disclose as to their sole reason for having been generated).<sup>5</sup> Instead, they suggest, the trial court and the Court of Appeals should have imagined that the investigation had an “administrative ordinary business course” safety review purpose. They suggest such a conclusion could properly be based upon on speculation about a wholly different type of investigation that the District “could,” “should,” or “would”

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<sup>5</sup> Obviously, Cowles and the media amici are at a necessary disadvantage here, given their inability to view the documents and see from their context and content that they were generated solely for the purpose of defending against a wrongful death claim.

As occurred in the trial court and the Court of Appeals, the documents here at issue have been transmitted to this court for *in camera* inspection. The School District submits the documents themselves leave no room for a conclusion as to the purpose of the investigation for which they were created, other than the anticipation-of-litigation purpose found by the trial court and the Court of Appeals. While the context and content of each and every one of the disputed documents supports that conclusion, the School particularly urges review of the following documents as dispositive of the reason and purpose for the investigation that was conducted, and the creation of all of the other 73 documents at issue: Document No. 54 (counsel’s initial insurance-defense liability and damages evaluation report to the District’s primary liability insurer, Hartford, which was prepared and transmitted within only 12 days of Nathan’s death); Document No. 71 (counsel’s pre-mediation settlement evaluation report to Hartford and to the District’s excess liability insurer, General Star Insurance, drafted some two months after Nathan’s death); and Document No. 75 (counsel’s confidential mediation memorandum to mediator John Riseborough).

have purportedly performed, had it not engaged in the investigation that it in fact did perform.

This assertion ignores the proper inquiry in this state for determining whether a document qualifies as work product. That proper inquiry focuses on whether the actual intentions, expectations, and purposes of the party who generated the document, at that time he or she did so, were to prepare for prosecution or defense of anticipated or actual civil litigation. The propriety of this inquiry, in the face of a claimed “ordinary course of business” characterization, was most extensively set forth by the Court of Appeals in *Heidebrink v. Moriwaki*, and then in this court’s subsequent review of that decision. In *Heidebrink* the Court of Appeals wrote:

Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus, the test should be whether, in light of the **nature of the document** and the **factual situation in the particular case**, the document can **fairly be said** to have been prepared or obtained **because of the prospect of litigation**.

*Heidebrink v. Moriwaki*, 38 Wash. App. 388, 396, 685 P.2d 1109 (1984) (emphasis added), *quoting* 8 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 2017-21, PP. 198-99, *rev’d on other grounds*, 104 Wn.2d 392, 706 P.2d 212 (1985). And while this court reversed the Court of Appeal’s ultimate disposition of that case, this court agreed with the propriety of the Court of Appeals’ statement of the inquiry, as follows: “We believe the better

approach to the problem is to look to the specific parties involved and the expectations of those parties.” *Heidebrink*, 104 Wn.2d at 400.

Here, there is no ground in the extremely unique and overwhelming factual record of this case for a conclusion different than the one reached by the trial court and the Court of Appeals – that based on the obvious, sole, and urgent intentions and expectations of the parties who generated the records, held by them at the time they were generated, those materials were and are “classic” work product indeed. CP 760; Opinion at 9.

Cowles and the media amici are welcome to criticize the District for what they believe it “could,” “should,” “might,” or “would” have done, by way of a different-purpose investigation than what the District in fact did perform. But that is a political criticism, and under this overwhelming factual record, a different purpose cannot now be pretended.

Further, as the Court of Appeals observed, the trial court’s determination here that each of the documents at issue is a work product document is a finding of fact, to be overturned only if substantial record evidence does not exist to support it. Opinion at 5, citing *Dawson v. Daly*, 120 Wn.2d 782, 792, 845 P.2d 995 (1993) and *Org. to Preserve Agric. Lands v. Adams County*, 128 Wn.2d 869, 882, 913 P.2d 793 (1996).<sup>6</sup> No amount of

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<sup>6</sup> This court has recently stated that a trial judge in a PRA case – just as in a non-PRA case – has broad discretion in determining whether a document is or is not protected by the attorney-client privilege or the work product doctrine. *O’Connor v. Dep’t of Social*

intellectually honest argument could refute that substantial evidence exists in the record of this case to support that conclusion by the trial court. Indeed even without affording that deference due the trial court here, a *de novo* review of the record, and of the documents themselves on an *in camera* basis, establishes the propriety of the trial court's and Court of Appeal's conclusion that the records at issue are "classic" work product.

**C. The Court of Appeals Properly Held That a "Substantial Need" Analysis Was Unnecessary, As There Was Substantial Evidence To Support a Finding the Materials At Issue are Opinion Work Product.**

Cowles alternatively "assumes arguendo" that the documents at issue are indeed work product, but asserts that they should nevertheless be disclosed because Cowles has substantial need of the information within the documents to fulfill its readership's purported desire for additional news stories concerning Nathan's death. Cowles asserts this ostensible "substantial need" somehow overrides the protections of the work product doctrine.

The Court of Appeals held that it need not even consider Civil Rule 26(b)(4)'s three-pronged "substantial need" standard, as a need inquiry is pertinent only where the documents in dispute are solely factual, non-opinion work product. Here however, the Court of Appeals correctly held there is

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*Health Services*, 143 Wash.2d 895, 905, 25 P.3d 426 (2001) (citing *Rhinehart v. Seattle Times Co.*, 98 Wash.2d 226, 232, 654 P.2d 673 (1982) as an illustration of the same discovery-ruling deference to be afforded a trial judge in an action between private parties not involving the PRA).

substantial evidence in the record to conclude that, per CR 26(b)(4), each of the disputed documents is imbued with the mental impressions, conclusions, opinions, or legal theories concerning anticipated litigation held by a party (i.e., here, by the School District's speaking agent representatives and the teachers, nurses, and parent volunteer who faced potential personal liability exposure), or by a party's attorney (i.e., here, by Mr. Manix and Mr. Clay), or by another representative of the party (i.e., here, by Mr. Prescott, the private investigator who was retained by the attorneys and who worked at the attorneys' direction and control), and that considerations of substantial need are immaterial.

Opinion at 17.

Again, *in camera* review of the disputed documents themselves, and of the overwhelming factual record below, confirms the correctness of the Court of Appeal's decision in this regard. The documents authored by Mr. Manix and Mr. Clay are undisputedly inextricably imbued with their thoughts, mental impressions, and theories, as counsel necessarily only memorialized matters that they subjectively determined were significant to their legal analyses of the tort liability and damages issues presented by the facts surrounding Nathan's death. So too are the documents generated by their investigator, David Prescott, who counsel retained and solely directed and controlled to assist in their tort defense efforts. Indeed the uncontradicted record establishes that before Mr. Prescott drafted any of the documents at issue, the attorneys shared

with him their factual and legal liability theories and strategies for the anticipated litigation, and then kept him apprised of their theories and strategies as those continued to evolve and Mr. Prescott continued to work for them. In fact, Mr. Manix and Mr. Clay directed Mr. Prescott precisely as to who he should interview at each stage of the investigation, as to specific questions they wanted him to ask those persons, and how the information they directed him to elicit from those various persons bore on the theories and strategies they had disclosed to him. E.g., CP 394-95, 536-38, 555-56.

In short, upon review of the massive and unique of-record evidence presented to the trial court here, and of the disputed documents on an *in camera* basis (including Mr. Prescott's actual notes), substantial evidence easily existed for the trial court to find that a reader of Mr. Prescott's writings would have a window into defense counsel's legal theories. *See* RP 87-89.

The Court of Appeals was correct in holding that a CR 26(b)(4) "substantial need" analysis was not necessary to uphold the rulings of the trial court, because each of the documents at issue inextricably constitutes opinion work product.

**D. And In Any Event, Cowles Failed to Demonstrate That Any of the Three CR 26(b)(4) Substantial Need Requirements Existed.**

Moreover, even though the Court of Appeals found it unnecessary to examine CR 26(b)(4)'s three-pronged "substantial need" test, it is important to

this court's review to observe that the exercise of indulging application of that test, as a superfluous matter, likewise leads to the result that the trial court reached.

In this regard, Cowles' entirely novel assertion – rejected by the trial court and the Court of Appeals – is that it had a legally-sufficient substantial need for the documents simply because Cowles wished to “fully” report to its readership the events leading up to Nathan's death, and Cowles believed it could not do so without access to the documents (though as pointed out extensively in the District's Brief in the Court of Appeals, at pp. 64-69, Cowles not only failed, but indeed abjectly refused, to prove that it did not already have, or could not obtain without undue hardship, substantially equivalent information).

Cowles cites no authority under Washington's PRA (let alone under the public records access laws of any of the other 49 states, or under any federal public records access record law), supporting a notion that a records requester's mere interest in knowing factual information within a government agency's litigation work product qualifies as a “substantial need” to invade that work product.

Indeed, a public records requester who seeks to overcome the “controversy” disclosure exemption of RCW 42.17.310(1)(j) for fact-only work product must meet the entirety of CR 26(b)(4)'s “substantial need” test,

because the rule in its entirety is incorporated by the exemption. *Limstrom, supra*, 136 Wn. 2d at 614-615 (imposing on a PRA requester the burden of proving that he had substantial need for otherwise-protect information to support legal proceedings in which he was involved, and that he had no alternative route without undue hardship to obtain the substantial equivalent); *see also id.* at 617 (“If a litigation opponent to a government agency cannot obtain access to the agency’s litigation materials through discovery, then neither should a citizen have access to those same materials through the public disclosure act.” *Id.* at 617 (Dolliver, J., dissenting, joined by Durham, C.J., Sanders, J., Smith, J.)).

Simply, under CR 26(b)(4), at the threshold a person cannot carry his burden of proving entitlement to disclosure of factual work product unless his need therefor is essential “to preparation of his case.” *Id.* By the express terms of Rule 26(b)(4), a court therefore may entertain a claim of “substantial need” in the PRA context only if the requester’s need relates to necessity for his or her *prosecution or defense of legal proceedings* – not, manifestly, for the requester’s preparation of a newspaper article.

Moreover, as noted, Cowles here utterly failed – and indeed abjectly refused in the trial court – to attempt to carry its burdens of proving that it did not already have information substantially equivalent to that contained in the disputed documents (e.g., based on interviews Cowles’ reporters had conducted

of witnesses to the events of Nathan’s death), or moreover, if it did not already have such information, that that it could not without undue hardship obtain such information through alternative means. As discussed at length in the District’s briefing below, Cowles refused to disclose what information it already possesses concerning the events leading to Nathan’s death, or even what witnesses it had or had not already interviewed, terming such matters “irrelevant and immaterial.” CP 639-59.

Thus even had the Court of Appeals found it appropriate to address Cowles’ “substantial need” position, that position is meritless.<sup>7</sup>

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<sup>7</sup> So too is the media amici’s suggestion that the documents should be disclosed to Cowles, because speculation as to the course of hypothetical litigation between the Walters and the District – had the claim not been settled – produces a possibility that **the Walters** might have been able to carry a CR 26(b)(4) “substantial need” burden for **their own** access to the information contained in the materials.

This Court in *Limstrom* made clear that it is the PRA **requester’s** claimed need that is appropriately to be examined in a PRA work-product case, not the purely speculative need of someone other than the requester. *See Limstrom, supra*, 136 Wn.2d at 614-15). Moreover, there is no basis to suggest the Walters, in hypothetical litigation against the District, could have demonstrated a CR 26(b)(4) showing so as to justify their invasion of the District’s work product. In the course of such a case, it cannot be gainsaid that the Walters could have obtained “substantially equivalent” information through alternative routes, because through interrogatory answers and answers to deposition questions, the District would have been required to disclose to the Walters **every single fact** documented in the disputed documents. Manifestly, the work product doctrine in no way justifies avoidance of discovery disclosure of **facts** that are contained in work product materials. What the doctrine protects against is disclosure of **those documents themselves**. Further and moreover, the Walters would have had subpoena authority to depose each and every one of the non-party witnesses who were interviewed by the District’s attorneys and their investigator in the course of the work product investigation at issue.

**E. The School District's Filing of the Underlying Action Was Expressly Authorized By RCW 42.17.330.**

Cowles and its media amici are wrong in asserting that the District's participation in filing the underlying action, with Nathan's Estate, was without procedural basis. As the District has repeatedly pointed out, RCW 42.17.330 expressly authorized the bringing of the action by either, or both, Nathan's Estate and the District. In pertinent part, the statute expressly states:

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

RCW 42.17.330 (emphasis added).

Cowles' sole argument to avoid the express language of the statute is based on Cowles' refusal to literally read the statutory language. Cowles instead says the statute, if read "the way the School District urges," would non-sensically authorize the government agency that received the request to obtain an injunction "against itself." Premised on that misreading, Cowles thus argues that the "agency" that is expressly authorized to bring an action under the statute "must necessarily" refer to a governmental agency other than the agency that received the request.

That Cowles' argument is a construct in obfuscation is obvious from the statute's express language. The language does **not** authorize the issuance of an injunction against an agency in possession of exempt records. What the statute instead expressly authorizes is issuance of an injunction against a PRA **requester**, prohibiting the requester from "examin[ing]" any document that falls within a PRA exemption ("[T]he examination of any specific public record may be enjoined if..." *Id*). The District urges a plain, literal reading of the statute, as upon such a reading there is no way the District can be seen as urging whereunder a government agency would be seeking an injunction "against itself."

Cowles further asserts that if an agency were able to institute a Declaratory Judgment action under RCW 42.17.330 for a determination of its obligations in response to a Public Records Act request, that procedure would result in greater litigation expenses for requesters under the PRA than the procedure Cowles urges. Cowles says this alleged increased expense would chill challenges to public agencies' improvident denials of access to records.

Simple arithmetic, respectfully, belies Cowles' argument. Under the procedure Cowles would say is solely proper here, if a requester under the PRA believes an agency has incorrectly determined that an exemption applies to records he has requested, the requester's **only** relief is to expend a

\$110 filing fee to initiate litigation against the agency, and to **then** incur those **very same** attorney fees and costs that he would incur if the action were instead brought by the agency. In either case, the requester must incur the very same attorney fees services and litigation expenses attendant to litigating the issue of whether the documents are exempt. In fact under the procedure initiated here by the District and the Walters, the only relative economic difference is that here, the requesters' expenses are **lesser** than Cowles' preferred procedure, to the extent of which party ends up bearing the \$110 filing fee.

For still another reason Cowles' assertion does not "pencil out," in terms of relative financial equities between a requester and an agency under the PRA. This is because under RCW 42.17.340(4), where an agency is ultimately determined by a Court to have been wrong in invoking an exemption for a requested record, regardless of the fact that it did so in the utmost good faith, the requesting party is nevertheless automatically entitled, if he requests it, to receive from the agency "compensation" by way of a fine of between \$5 and \$100, **per day**, for each day that passed between the time the request was made and the time of the Court's ruling that it should have been produced. *E.g., King County v. Sheehan*, 114 Wn. App. 325, 351, 57 P.3d 307 (2002).

Thus if Cowles' preferred procedure here were mandated despite the directly contrary express statutory language, a requester under the PRA who receives an agency denial could wait an indefinite and very lengthy period of time before filing litigation – and when he ultimately does so, if he succeeds on the merits, receive the self-created windfall of the mandatory fine which is authorized by the PRA for each day he chose to delay bringing suit. Under the procedure Cowles prefers in the face of express contrary statutory language, an agency would have no control to limit its exposure to the mandatory daily fine – an especially inequitable result in cases where an agency has a good faith belief that an exemption applies, but the authorities are unclear and can only be settled by the requestor's resort to a judicial declaration whenever he or she chooses to bring it.

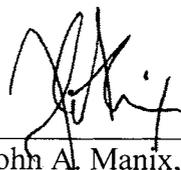
Finally and regardless of the foregoing, Cowles itself has rendered its own argument moot. Cowles' entire (albeit legally incorrect) point is that a dispute regarding the applicability of an exemption to the PRA is susceptible to resolution, only, by the requester obtaining a Show Cause Order from the Superior Court directing the agency to appear and demonstrate why an exemption to the PRA justifies its withholding of records. Cowles in fact obtained and served such a Show Cause Order upon the District here. The District responded to it and the trial court found the District had carried its burden of showing cause why the documents fit within an exemption to the

PRA. CP 766. Even indulging Cowles' own argument, the issue was properly joined by the procedure Cowles itself employed, and it was decided by the trial court. Thus even indulging Cowles' position as to the purportedly "proper" procedure, that procedure was followed here and the Show Cause proceedings below mooted any conclusion otherwise.<sup>8</sup>

Respectfully submitted this 5<sup>th</sup> day of February, 2007

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FILED AS ATTACHMENT  
TO E-MAIL

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<sup>8</sup> Cowles appears to agree with this conclusion on appeal, as Cowles concedes that at oral argument in the trial court, the parties reached agreement that the trial court should reach and decide the merits because of Cowles' own Show Cause filing. *See* Cowles' Opening Brief in the Court of Appeals at 17.