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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FREDRICK AND ANNALESA THOMAS,

Plaintiffs-Appellants,

v.

PIERCE COUNTY PROSECUTING ATTORNEY'S OFFICE,

Defendant-Appellee.

OPENING BRIEF OF APPELLANTS

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## A. INTRODUCTION

Plaintiffs-Appellants Annalesa and Fredrick Thomas requested records under Washington's Public Records Act (PRA), RCW 42.56 *et seq.*, from Defendant-Respondent Pierce County Prosecuting Attorney's Office ("the Prosecutor's Office"). These included police reports, witness statements, audio and video recordings, and other records routinely and independently created by municipal police agencies that responded to the May 24, 2013 officer-involved shooting of Plaintiffs' son, Leonard Thomas.

At the time of the relevant PRA request, the municipal police agencies had transferred to the Prosecutor's Office *en masse* hundreds of pages of police reports, interview transcripts, and other records created by the police. The municipal police made this transfer either through an inter-agency website (Records Management System), or by personal delivery of two binders that reflected the "complete copy of the Fife Police Department's investigative file" regarding the officer-involved shooting. Plaintiffs attempted to obtain such records from the cities themselves, but those requests were denied under RCW 42.56.240(1)'s categorical "law enforcement" exemption.

On September 3, 2013, the Prosecutor's Office denied the request, in salient part based on work product. The next day, the Prosecutor

announced the killing of Leonard Thomas was justifiable homicide. The County did so based on fact-finding that took place in secret, behind closed doors. In contrast to a public inquest, the shooting victim's family could not be represented by counsel, was denied access to the underlying documents, and could not question the participating officers.

Plaintiffs brought suit under the PRA against the Prosecutor's Office. The King County Superior Court resolved competing motions for summary judgment, in favor of Defendant, bound by this Court's plurality decision in *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998), holding "materials gathered into a prosecutor's file during a pending investigation" are "ordinary work product." However, the trial judge, a former prosecutor himself, observed Pierce County's position was "inconsistent with the spirit of the work product rule," finding it was "unlikely that anyone viewing the materials the [Prosecutor's Office] gathered during its investigation would have gained any insight into the prosecutor's mental impressions, ideas, or legal theories related to the potential litigation," and "the prosecutors [here] literally just requested all documents from all law enforcement agencies involved in the shooting, and then placed those documents into their files."

Under Washington law, records created in the regular course of municipal business cannot be work product on their own. *See Morgan v.*

*Federal Way*, 166 Wn.2d 747, 213 P.3d 596 (2009). These same records cannot be transformed into work product by changing their location. “Work product” protection must entail some work, for instance as described in the seminal case, *Hickman v. Taylor*, where a lawyer “sift[s] what he considers to be the relevant from the irrelevant facts.” 329 U.S. 495, 511 (1947).

This Court should hold that the investigative reports and other documents here, independently created by third-party municipal police agencies in the ordinary course of business, fall outside work product protection. Notwithstanding *Limstrom*, this Court should tailor its work product rule to require a showing that an agency’s attorney or agent (or any proponent of the privilege) engaged in some record selection or compilation, the disclosure of which would reveal mental processes the rule was designed to shield.

## **B. ASSIGNMENTS OF ERROR**

1. The trial court erred in granting Defendant-Respondent’s motion for summary judgment that Defendant did not violate the Public Records Act (PRA), RCW 42.56 *et seq.*, by withholding as work product police reports and other documents created by third parties and transferred in bulk into the Prosecutor’s file.

2. The trial court erred in finding that Plaintiffs-Appellants did not have a substantial need under CR 26(b)(4) for the documents requested under the PRA, which would overcome Defendant's claim of work product credited by the trial court.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Do investigative reports, witness statements, and other documents, routinely and independently created by third-party municipal police agencies in the ordinary course of business and handed over as a matter of routine, fall outside the attorney work product protection?

2. Is the Prosecutor's Office entitled to work product protection with respect to documents that were, and are, routinely and independently created by various municipal police agencies and then transferred in bulk into the "Prosecutor's file" without an independent selection or compilation process?

3. Should this Court modify its plurality decision in *Limstrom v. Ladenburg*, 136 Wn.2d 595 (1998), to make clear that a responding agency (or party to litigation) must at least demonstrate some actual selection or compilation process regarding documents routinely and independently created by third-party police agencies, before the agency (or party) may withhold such documents as attorney work product?

4. Does a records requester have a substantial need for police reports, witness interviews, and other records created by law enforcement used in investigating an officer-involved shooting death where the records are unavailable from the police agencies themselves as "investigative

records” under RCW 42.56.240, yet have been forwarded to the Prosecutor’s Office?

**D. STATEMENT OF THE CASE**

**1. Facts Surrounding the Thomas’s Public Records Request to the Pierce County Prosecutor.**

**a. The May 24, 2013 Shooting of Leonard Thomas.**

In the evening on May 23, 2013, Plaintiff Annalesa Thomas called the police about a minor dispute she had with her son, Leonard. Annalesa was concerned Leonard was distraught over the death of a friend, intoxicated after a year of sobriety, and with his four-year old son. *See, e.g.,* CP 62, 65, 95. She called 911 and reported what police later claimed was a “domestic violence/assault 4,” because Leonard took the phone from her hand. CP 62.

When Fife police officers arrived at his house, Leonard, who was African American, told the officers they should get off his property, that he hadn’t committed a crime, that they should leave him alone, and that he would not hand over his child to Fife police officers with whom he’d had problems in the past. CP 65. Metro SWAT was called in, and the police designated the incident a “hostage situation.” CP 70.

Metro SWAT arrived with full military force: They had one “bear cat” vehicle, one “armed transport” vehicle, two snipers, surveillance around the house perimeter, and front and rear entry teams with explosive devices if needed. CP 91-93. More than an hour of negotiations ensued during which time Leonard repeatedly told the negotiator (Sgt. Eakes) that

he had committed no crime, that he had no weapon, and that the officers should leave him alone. CP 72-73. According to Sgt. Eakes, Leonard never made any threats to the child or the officers. CP 71. The officers kept Leonard under intensive surveillance, and they too reported that he made no threats to the child, that the child did not appear distressed, and they did not see any weapon. *See, e.g.*, CP 79; CP 83; CP 87-88.

During these negotiations, Plaintiff Fredrick Thomas arrived at the home, which he owned. He was not permitted to speak with Leonard. Frustrated the police could not get through to his son, Frederick tried to approach the house to speak directly to Leonard. CP 65-66; CP 75. He was arrested, restrained, and transported to the Fife Police Station, while the officers continued to negotiate with Leonard—before ultimately killing him. CP 65-66.

Leonard wanted to hand over the child to Annalesa, and not to the officers. See CP 117-21. As Sgt. Eakes negotiated with Leonard, SWAT Commander Michael Zaro issued a directive to not let Leonard re-enter the house if he tried to do so with the child. CP 118-20. The snipers understood this as an order to use lethal force. CP 89-90. Commander Zaro also coordinated with a team at the rear of the house to place an explosive device on the back door and force entry. CP 121-22. During an attempt to let the child go, the team detonated the explosive. The sudden, very loud explosion startled Leonard and he moved toward his child, according to the officers. CP 92. Officer Brian Markert, the sniper

tracking Leonard after he exited the front door, then shot Leonard, fatally. CP 147-48.

Leonard was unarmed. He made no threats to the child or the officers. No one claims to have seen him with a weapon. According to Officer Markert, Leonard was shot and killed because of his on-going “noncompliance” and his hesitation during an agreed-to release of his child. CP 147.

**b. Municipal Police Officers Investigated the Officer-Involved Shooting Independently of the Prosecutor’s Office.**

In the shooting’s aftermath, detectives from the Fife and Lakewood Police Departments, among other municipal police officers, investigated the officer-involved shooting. *See, e.g.*, CP 19-33; CP 163-64; CP 199-201. In so doing, municipal detectives interviewed witnesses, recorded those interviews, documented evidence collection, and completed narrative reports in the ordinary course of police business and not at the direction of the Prosecutor’s Office or its investigator, Keith Barnes. *Id.*

The municipal police officers provided their complete reports to the Prosecutor’s Office. Most of the officers submitted their completed reports by uploading them onto an intranet, the South Sound 911 Record Management System (RMS), to which the Pierce County Prosecuting Attorney’s Office shared access with other member law enforcement agencies. CP 199-201. Reports and records created or compiled by Fife and Bonney Lake detectives were provided to the Prosecutor’s Office by Fife’s lead detective, Thomas Gow, who personally presented them to

Pierce County prosecutors, handing them “a complete copy of the Fife Police Department’s investigative file regarding the May 24, 2013 officer-involved shooting of Leonard Thomas” on August 28, 2013. CP 163-64.

**c. The Prosecutor’s Office, In Conjunction With the Pierce County Medical Examiner, Reviewed the Officer-Involved Shooting to Determine Whether to Charge Officer Markert With Unjustified Homicide Under RCW 9A.16.040.**

Instead of holding a public inquest when police officers kill unarmed citizens, the Pierce County Prosecuting Attorney determines whether fatal officer-involved shootings are justified, without any public participation or access to investigative information. *See* CP 138-44. In contrast to a public inquest, the shooting victim’s family is excluded, and has no opportunity to engage in discovery, review documents, or cross-examine the participating officers. *Compare* CP 138-44; *with* RCW 36.24; King County Executive Order PHL 7-1-1 (AEO), Appendix 2 (allowing for family to be represented by counsel, engage in pre-inquest discovery, and examine witnesses).

Because the Prosecutor’s Office performed its investigation in secret and without public access or participation, it is unknown what the factual bases were for the ultimate decision that the killing of Leonard Thomas was “justifiable.” CP 34. It appears from the Prosecutor Office’s account, provided in its moving papers to the trial court here, that prosecutors largely accepted the views of Officer Markert and Commander Zaro that the homicide was justifiable because Leonard had “reach[ed] out to take the boy back” when SWAT officers set off a bomb

at his back door while he was in the process of taking his son to his mother. CP 2.

**2. Annalesa and Fredrick Thomas Filed Public Records Requests To Find Out Why Their Son Was Killed.**

Plaintiffs first requested records about the shooting from the municipal police departments themselves, on May 29, 2013, and again on July 24, 2013. *See, e.g.*, CP 159-62. All but one agency refused to produce the records under RCW 42.56.240(1), because they were purportedly part of an “open and active investigation” that “would go to the Pierce County Prosecutors’ Office for review.” *Id.* The single agency that did provide something produced only a few insignificant documents.

On August 5, 2013, Plaintiffs submitted a public records request to the Prosecutor’s Office for the following:

This is a public records request under RCW 42.56 for all files, records, and documents containing any information regarding the shooting of Leonard Thomas at his home located at 218-55th Avenue East, Fife, WA 98424 on May 24, 2013, the events surrounding that shooting, and the investigation that followed it.

This request includes but is not limited to any investigative report or submission made to the Prosecuting Attorney from any of the police agencies or investigating agencies involved in this incident or its aftermath.

CP 104-05.

On September 3, 2013, the Prosecutor’s Officer denied Plaintiffs’ request, under RCW 42.56.240(1), claiming that “nondisclosure” of the documents was “essential to effective law enforcement or for the protection of any person’s right to privacy.” CP 107-09. In addition, the

Prosecutor's Office claimed that "a prosecutor's office is afforded a work-product privilege regarding any materials gathered in anticipation of a litigation decision." CP 108.

On September 4, 2013, the day after denying Plaintiffs' request, the Pierce County Prosecutor issued a press release announcing the killing of Leonard Thomas was justifiable homicide under RCW 9A.16.040. CP 34-35; CP 107.

On October 3, 2013, Plaintiffs inquired with the Prosecutor's Office whether it would release the previously requested documents in light of the fact that the Prosecutor had completed his investigation and decided not to file criminal charges against the shooter. CP 111. On October 7, 2013, the Prosecutor's Office confirmed that the September 3, 2013 request denial, based on alleged work product protection, "remains in effect." CP 113.

### **3. Procedural History**

On November 1, 2013, Plaintiffs filed suit under the PRA, asserting *inter alia* that "[a]fter the September 4, 2013 announcement of the Pierce County Prosecutor's conclusion that the Thomas killing was purportedly justifiable, the requested documents should have been disclosed and produced because, even by the Prosecutor's own account, there is no more open and active investigation into the officer's shooting under RCW 9A.16.040 or otherwise"; and "[t]he work product privilege . . . does not authorize Pierce County to refuse to produce any of the requested documents." CP 100-01.

On November 21, 2013, Defendant Pierce County moved to dismiss Plaintiffs' PRA suit under CR 12, which the trial court denied on December 20, 2013. CP 4.

On January 10, 2014, Pierce County moved to dismiss under CR 56, arguing under *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998), that police reports "gathered by the prosecutor . . . as part of the prosecutor's fact gathering process" are work product, CP 7; and that all records "in a prosecutor's possession" are protected. CP 8. Defendant also argued the categorical "investigative records" exemption under RCW 42.56.240 authorized the Prosecutor's Office to withhold the records in response to any request made before September 4, 2014. CP 11-14.

On January 27, 2014, Plaintiffs responded and cross-moved for summary judgment. *See* CP 36-56. Plaintiffs argued work product protection could not apply to police reports created and submitted in the ordinary course of municipal police business (CP 45), and that they could not be transformed into work product because the Prosecutor's investigator "simply took all the documents uploaded to the [Records Management System], or received [them] as complete hardcopies, and moved them into the Prosecutor's file." CP 46. Plaintiffs claimed in the alternative that they met the "substantial need" test for "ordinary work product" because Plaintiffs wanted to review the documents before the Prosecutor made any charging decision, and they were unable to obtain them elsewhere because the police agencies had categorically exempted the records under RCW 42.56.240. CP 50-51. Plaintiffs also argued

RCW 42.56.240 was inapplicable by the time Plaintiffs renewed their request on October 3, 2013 because any investigation was complete when the Prosecutor announced on September 4, 2013 that he would not file criminal charges against the shooting officer. CP 51-56.

On March 28, 2014, Judge Roger Rogoff of the King County Superior Court held oral argument. Judge Rogoff, a former county and federal prosecutor himself, articulated the shortcomings of the rule in *Limstrom* as applied to circumstances like those here, in a colloquy with defense counsel:

*Li[m]strom* is pretty clear language about things that are gathered in anticipation of litigation . . . is stuff that is considered work product. My question is this: Would you agree that given the Brady Rules for criminal prosecutors, given the fact that they are going to be required under law to provide every ounce of every single thing they get from law enforcement agencies about their case to the defense, and under the criminal discovery rules, but also it's going to all get transferred. They have to collect everything, because if they don't, they're going to get in trouble.

Given that, isn't the *Li[m]strom* case -- which was a plurality decision, four justices, isn't it inconsistent with the purpose of the work product rule, which is really . . . to protect prosecutors from having to give up their impressions of what the case is about, and their legal strategies, and so forth? If they're gathering everything, what does that tell you about what their impressions of the case are, what their legal theories are?

*See* Record of Proceedings (RP), 15:7-16:1.

In response, defense counsel had no policy rationale for applying the work product doctrine; he stated only, "that's not the law in

Washington State,” *i.e.*, under *Limstrom* and *Koenig v. Pierce County*, 151 Wn.App. 221, 211 P.3d 423 (2009). *See* RP, 16:6-7; 16:23-17:17:5.

Judge Rogoff queried further:

But what the basis for the work product rule regarding gathering . . . is if the prosecutor gathers this, leaves that, gathers some of that, that tells you something about where they’re headed with the case.

But here where the prosecutor is required to gather everything, how can that possibly tell you anything about their mental impressions or what the -- what they’re thinking about with regard to the case?

I think [this is] . . . a case that is going to test *Li[m]strom*, because there is no question in this case that there was no gathering in any meaningful way other than “We’re the prosecutor and we need every document we can possibly get in order to: number one, be able to fulfill our criminal discovery obligations; and number two, we need everything in order to make a decision about our case.”

RP, 16:12-20; 17:6-16.

On April 1, 2014, the trial court issued its decision, granting Defendant’s motion for summary judgment. CP 209-220. Judge Rogoff, bound by *Limstrom*, found the records were “materials gathered into a prosecutor’s file during a pending investigation” and thus “ordinary work product,” which must not be produced absent showing substantial need for the materials and an inability to obtain the substantially equivalent information by other means. *See* CP 217-19. However, he reprised his misgivings about *Limstrom*’s application to these facts:

The Court looks favorably upon [Plaintiffs'] policy argument that the designation of the materials in the prosecutor's files in this case as work product, is inconsistent with the spirit of the work product rule. It is unlikely that anyone viewing the materials the Prosecutor's Office gathered during its investigation would have gained any insight into the prosecutor's mental impressions, ideas, or legal theories related to the potential litigation. In this case, the prosecutors literally just requested all documents from all law enforcement agencies involved in the shooting, and then placed those documents into their files.

CP 219-220.

On April 23, 2014, the trial court entered judgment dismissing Plaintiffs' PRA claims. On April 28, 2014, Plaintiffs timely filed their Notice of Appeal. CP 224-229.

## **E. ARGUMENT**

### **1. Standard of Review and PRA Canons of Construction.**

“Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Gronquist v. Washington State Dept. of Licensing*, 175 Wn.App. 729, 742, 309 P.3d 538, 544 (2013) (citing CR 56). This Court reviews legal interpretations and applications of PRA provisions de novo. *See Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009).

The Public Records Act “is a strongly worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). This mandate for broad disclosure stems from the Legislature's decree under the PRA:

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 have created.

RCW 42.56.030; *see also Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 522, 326 P.3d 688 (2014); *Bellevue John Does 1-11 v. Bellevue School Dist. #405*, 164 Wn.2d 199, 209, 189 P.3d 139 (2008) (“The policy behind the PDA is to ensure ‘full access to information concerning the conduct of government on every level[.]’”) (quoting former RCW 42.17.010(11)).

“The act should be liberally construed and its exemptions should be narrowly construed in favor of disclosure.” *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007) (citing RCW 42.56.030); *accord Sargent v. Seattle Police Dept.*, 179 Wn.2d 376, 385, 314 P.3d 1093 (2013).

It is also well established that “the public . . . has a right to every man’s evidence, except for those persons protected by a constitutional, common-law, or statutory privilege,” *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (citations and internal quotation marks omitted), and such privileges “are not lightly created nor expansively construed, for they are in derogation of the search for truth.” *United States v. Nixon*, 418 U.S. 683, 710 (1974); *accord State v. Maxon*, 110 Wn.2d 564, 567, 569, 756 P.2d 1297 (1988).

Under the PRA, an “agency has a positive duty to disclose public records upon request, unless a specific exemption applies to the records requested.” *Limstrom*, 136 Wn.2d at 604. “The agency refusing to release records bears the burden of showing secrecy is lawful,” *Fisher Broadcasting*, 180 Wn.2d at 522; thus an agency bears the burden of establishing that a particular public disclosure exemption applies. RCW 42.56.550(1).

**2. The Prosecutor’s Argument Expands the Work Product Doctrine Beyond Its Common Law Purpose, Common Sense, and the Confines of *Limstrom*.**

**a. Purposes of the Work Product Doctrine.**

The privilege of work product protection emerged, as recognized in *Limstrom* itself, from the seminal case, *Hickman v. Taylor*, 329 U.S. 495 (1947). *Hickman* concerned a capsized tugboat and the surviving crew members’ attempt to obtain through civil discovery written witness statements and detailed descriptions of oral statements they made to the vessel’s defense lawyer during his interviews. *Id.* at 499. *Hickman* held such material need not be disclosed, based on the following rationale:

Here is simply an attempt . . . to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. . . . Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests.

*Id.* at 510-11.

*Limstrom* acknowledged these fundamental principles from *Hickman*. See 136 Wn.2d at 609-10; see also *State v. Pawlyk*, 115 Wn.2d 457, 475, 800 P.2d 338 (1990) (“The work product doctrine protects from discovery an attorney’s work product, so that attorneys can work with a certain degree of privacy and plan strategy without undue interference.”) (internal quotation marks omitted).

**b. *Limstrom* Does Not Support Defendant’s Theory That All Documents Gathered into a Prosecutor’s File Are Work Product.**

**i. *Limstrom* Is a Non-Precedential Plurality Decision.**

*Limstrom* addressed the issue whether “criminal litigation files created and held by an attorney working for a public agency [are] subject to disclosure under the public records act,” 136 Wn. 2d at 603, with the “primary dispute” being “whether an attorney’s criminal litigation files, in their entirety, are protected from disclosure under the attorney work product exemption.” *Id.* at 605.

In *Limstrom*, the requester asked for “any and all files maintained in or by [the prosecutor’s office] in which Deputy

Eugene Allen, of the Pierce County Sheriff’s Department, was involved.” 136 Wn.2d at 601. The requester then enlarged his request to include “a statistical summary of 54 DUI arrests made by Deputy Allen,” specifically asking for “the DataMaster serial number for each test, the date of the breath test, the test score, and the suspect’s date of birth.” *Id.* at 602. As it did here, the Pierce County Prosecuting Attorney’s Office raised the work product shield, claiming that “except for charging documents . . . criminal litigation files developed and held by a prosecutor are, *in their entirety*, work product and exempt from disclosure[.]” *Id.* (emphasis added).

In the plurality decision, four Justices held that the civil rules of discovery should apply for purposes of determining the scope of work product, rather than an interpretation of work product under the criminal discovery rule, which protects “legal research or documents ‘to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies.’” *Limstrom*, 136 Wn.2d at 606 (quoting CrR 4.7); *see also id.* at 609. In so doing, the four Justices adopted a work product analysis developed by Professor Lewis H. Orland of Gonzaga University School of Law, *see Observations on Work Product Rule*, 29 Gonz. L. Rev. 281 (1993-94), which *Limstrom* concluded divided work product into three distinct types:

- (1) The mental impressions of the attorney and other representatives of a party are absolutely protected, unless their mental impressions are directly at issue. *Pappas v. Holloway*, 114 Wash.2d 198, 212, 787 P.2d 30 (1990).
- (2) The notes or memoranda prepared by the attorney from oral communications should be absolutely protected, unless the attorney's mental impressions are directly at issue. *Pappas*, 114 Wash.2d at 212, 787 P.2d 30; *Dever v. Fowler*, 63 Wash.App. 35, 48, 816 P.2d 1237 (1991).
- (3) The factual written statements and other tangible items gathered by the attorney and other representatives of a party are subject to disclosure only upon a showing that the party seeking disclosure of the documents actually has substantial need of the materials and that the party is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. *Heidebrink [v. Moriwaki]*, 104 Wash.2d 392, 706 P.2d 212 [1985]. See Orland, *supra*, at 300-01.

*Id.* at 611-12.

Applying this analysis, the four Justices held that “[w]ith respect to the factual documents gathered by the prosecutor . . . the documents are part of the prosecutor’s fact-gathering process and are work product.” *Limstrom*, 136 Wn.2d at 614. “With respect to motions, orders and other documents that are readily available from the court clerk,” *Limstrom* held any “documents [that] contain highlighting or notes” were work product, but if “unmarked, then, as a general matter, they are not attorney work product and should be disclosed.” *Id.* at 615. Finally, the four

Justices found with respect to “offer sheets” that it was “conceivable that some or all of the offer sheets, standing alone, are not work product and are subject to disclosure. It also is conceivable that offer sheets from 54 separate cases, examined together, might show litigation strategy or a legal method of resolving cases that constitutes an attorney’s work product.” *Id.*

The four Justices remanded for *in camera* review to determine which documents were work product. *Limstrom*, 136 Wn.2d at 614. Justice Madsen did not endorse the analysis, but concurred “in result only.” *Id.* at 617. Justice Dolliver and three others dissented, concluding that the more narrow work product protection under CrR 4.7 should apply. *Id.* at 618.

The broad definition of work product in *Limstrom* as “formal or written statements of fact, or other tangible facts, gathered by an attorney in preparation for or in anticipation of litigation” is dictum, a creature of the plurality decision, and thus not binding. *See Harris v. Drake*, 116 Wn.App. 261, 270 n.24, 65 P.3d 350 (2003) (“[i]t is well established that an opinion that expresses the views of less than a majority of the members of the court is not precedent,” “noting plurality’s reasoning not binding . . . under the doctrine of *stare decisis*,” and “plurality’s rationale is not controlling for other cases”) (internal quotation marks omitted); *see also, e.g., State v. Gonzalez*, 77 Wn.App. 479, 486, 891 P.2d 743 (1995) (plurality opinions “have only limited

precedential weight and are not binding”); *State v. Zakel*, 61 Wn.App. 805, 808, 812 P.2d 512 (1991) (“Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds.”) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). We address the narrow holding of *Limstrom* accordingly.

**ii. *Limstrom* Is Distinguishable on its Facts.**

The records at issue in *Limstrom* related to those prepared by Pierce County Sheriff’s Deputy Eugene Allen or someone else in Prosecutor’s Office or the Sheriff’s Office, and a “statistical summary” Pierce County Sheriff’s Deputy Allen created about his DUI arrests. *See* 136 Wn. 2d at 601-02. Though *Limstrom* did find in that case that police narrative reports, among other documents in the prosecutor’s file, were work product, *id.* at 614, those reports were prepared by a Pierce County Sheriff’s Deputy, *i.e.*, by a “representative” of the deputy prosecutor. *See* CR 26(b)(4) (protecting only documents “prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative”).

The Thomas PRA request, by contrast, sought nothing prepared by the Prosecutor’s Office, its investigator (Keith Barnes), or the County’s law enforcement agents (Pierce County Sheriff’s deputies). If anything, the police reports Plaintiffs sought were more akin to documents “readily available from the court

clerk” and thus disclosable. *See Limstrom*, 136 Wn.2d at 615. To the extent the requested documents included witness statements, municipal police officers prepared those statements—without instruction from or affiliation with the Prosecutor’s Office. *Cf. Seattle Times Co. v. Serko*, 170 Wn.2d 581, 592, 243 P.3d 919 (2010) (“no authority for . . . contention that an investigator from a law enforcement agency is merely an arm of the prosecutor’s office for purposes of a work product analysis”).

Here, Lakewood investigators “prepared” reports “as part of their duties in reporting their official activities, pursuant to their training and experience guided by the policies of the Lakewood Police Department,” including sixteen reports submitted via the South Sound 911 Records Management System (RMS). *See CP 199-200*. It is undisputed that the Prosecutor’s Office did nothing more than move these records in bulk from the RMS intranet site to its own file. As Mr. Barnes confirmed at deposition, he simply downloaded “all” the records Lakewood and other police agencies uploaded onto RMS. *See CP 134-35*.

Other than the reports available through RMS, the trial court found that “[a]ll other types of records and files which Lakewood officers or employees prepared . . . were delivered to the lead investigative agency, the City of Fife, which in turn provided them to the Prosecutor’s Office.” *CP 200-01*. In fact, Fife’s Det. Thomas Gow personally gave the Prosecutor’s Office

“a complete copy of the Fife Police Department’s investigation file” in the week before August 28, 2013. CP 163-64. According to Det. Gow, this delivery included “reports written by City of Fife police officers . . . as part of the Fife Police Department’s normal course of business and consistent with our standard investigatory protocol.” CP 164. Again, Mr. Barnes confirmed these documents were ones that *Fife officers* “had collected” and provided to the Prosecutor’s Office, in “two notebooks.” CP 199.

Contrary to Defendant’s argument and the undisputed evidence, Mr. Barnes did not “gather” or “collect” any documents here in any meaningful way. Application of the work product rule under these circumstances touches none of the interests *Hickman* sought to protect.

Under *Hickman*, “gathering” must mean more, *i.e.*, that one “sift[s] what he considers to be the relevant from the irrelevant facts.” 329 U.S. at 511. Here, the officers from Fife, Lakewood and the other municipal police agencies did all the work. They interviewed the witnesses, recorded the statements, collected and sifted through the documents, and then uploaded the results of their work onto RMS, or (in the case of Fife) assembled *their work* into two binders, and then handed them over to Pierce County. As Judge Rogoff accurately found, “[t]he prosecutors [here] literally just requested all documents from all law enforcement agencies

involved in the shooting, and then placed those documents into their files.” CP 220.

Such undifferentiated gathering does not create a “product” that reveals mental impressions or legal strategies. It thus cannot qualify for withholding under any “narrowly construed” exception to the PRA; *see Soter, supra*; or under any evidentiary canon that prohibits “expansively construed” privileges. *Maxon*, 110 Wn.2d at 569.

Defendant undoubtedly will again rely on *Koenig v. Pierce County*, 151 Wn.App. 221, 211 P.3d 423 (2009), as it did in the trial court. But this Court need not accept the reasoning of *Koenig* any more than it must follow the *Limstrom* plurality to which *Koenig* deferred. *See id.* at 231 (noting a “plurality opinion is often regarded as highly persuasive, even if not fully binding”).

In any event *Koenig* is not inconsistent with the logical principle that to produce a “product,” “work” must involve at minimum some selection process. In *Koenig*, the requester asked both the Pierce County Prosecutor and the Pierce County Sheriff’s Department for documents related to an allegedly unlawful traffic stop. 151 Wn. App. at 225. The prosecutor produced 188 pages, but withheld as work product “44 pages of police reports and 139 pages of transcripts of witness interviews conducted by the sheriff’s office and held by the prosecutor,” among others. *Id.* at 226. Relying on *Limstrom*, *Koenig* concluded these documents

were “ordinary” work product subject to production only on a showing of substantial need for the documents and the inability to obtain them from other sources. *Id.* at 230. Like *Limstrom*, however, *Koenig* is distinguishable from the Plaintiffs’ request here because the reports and witness statements in that case were largely prepared not by independent agencies, as here, but by the Pierce County Sheriff’s Office, *i.e.*, the prosecuting attorney’s “representative.”

To the extent *Koenig*’s work product ruling encompassed third-party municipal police reports, the case is silent about what selection process underlay the protection. But whatever that may have been, it is clear that even *Koenig*’s expansive view of work product protection did not shield everything in the prosecutor’s file because the prosecutor’s office released a considerable number of documents (188). 151 Wn. App. 227. This distinguishing fact necessarily undermines Defendant’s position here that the prosecutor may withhold as work product *any* document, however and by whomever it was created, just because it is located in the prosecutor’s file.

**3. This Court Should Clarify *Limstrom* and Hold That Work Product Covers Only Those Documents Disclosure of Which Reveals Some Mental Process.**

The *Limstrom* plurality relied on Professor Orland’s tripartite division of work product to authorize, at least in that case, withholding of “factual written statements and other tangible items gathered by the

attorney and other representatives of a party,” without a showing that the attorney or agent had engaged in any selection process that might reveal mental processes. *See* 136 Wn. 2d at 611-12. But *Limstrom* did not cite any Washington authority for rejecting the criterion that a proponent of work product must show some active selection process.<sup>1</sup>

In *Limstrom*, this Court also did not have occasion to consider the question of whether, or when, police reports, taped interviews, and other documents routinely prepared by third-party police agencies should acquire work product status. Nor did *Limstrom* weigh any policy considerations for extending such a privilege to this context. Finally, the *Limstrom* plurality did not establish a broad rule, noting only: “Professor Orland reviews the conflicting decisions in the federal circuit courts which have applied the federal discovery rule, Rule 26(b)(3), and suggests a bright-line rule be applied to discovery requests for attorney work product. Professor Orland’s suggested rule is consistent with our decisions, *and we apply it in this case.*” *Id.* at 611 (emphasis added).

Defendant’s radical interpretation of *Limstrom*, which the trial court accepted with outspoken reluctance, is at odds with the historical

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<sup>1</sup> *Limstrom* cited *Heidebrink* for the principle that “[m]ental impressions of the attorney and other representatives embedded in factual statements should be redacted.” 136 Wn.2d at 612. However, it cites no authority for the principle that an actual selection process has no bearing on the core of the adopted rule that “factual written statements and other tangible items gathered by the attorney and other representatives of a party are subject to disclosure only upon a showing . . . [of] substantial need . . . and that the party is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.” *Id.* For this rule, *Limstrom* relied only on Professor Orland. *Id.*

purposes of the work product doctrine and modern jurisprudence about it, which is aimed at safeguarding an attorney's mental processes as the focus of the rule. *See Republic of Ecuador v. Mackay*, 742 F.3d 860, 870 (9th Cir. 2014) (holding communications and draft reports exchanged between expert and attorney are work product).

Washington law, federal law, the purpose of the *Hickman* rule, and the practical realities of civil discovery all point to a requirement, notwithstanding *Limstrom*, that the withholder of work product must show that disclosure would reveal some mental process of the attorney or her agent by virtue of a selection process. It is beyond dispute that Defendant cannot show that here.

**a. Washington Law and Federal Law Do Not Permit Records Created in the Ordinary Course of Business to Be Withheld as Work Product.**

Washington law already holds that “[t]he work product doctrine does not shield records created during the ordinary course of business.” *Morgan v. Federal Way*, 166 Wn.2d 747, 754, 213 P.3d 596 (2009); *see also In re Detention of Williams*, 147 Wn.2d 476, 494, 55 P.3d 597 (2002) (party had to divulge to prosecutor Social Security reports regarding disability in conjunction with sentencing determination); *Heidebrink*, 104 Wn.2d at 398-99 (“statements from non-party witnesses” in insurance investigation reports not work product); *State v. Brown*, 68 Wn.2d 852, 416 P.2d 344, 349 (1966) (“The possibility that these reports may have contained opinions of the officers would not necessarily qualify them as the work product of the deputy prosecutor.”).

There is no evidence that the police reports at issue here were prepared in anticipation of litigation or at the direction of the Prosecutor's Office. For this reason, courts do not extend work product protection to such types of reports and related materials. *See, e.g., Pacific Gas and Elec. Co. v. U.S.*, 69 Fed.Cl. 784, 796-97 (2006) (with police reports courts look "at whether the police investigation was made in anticipation of litigation or whether it was routine procedure"); *Gov. of Virgin Islands v. Fahie*, 419 F.3d 249, 257 (3d Cir. 2005) ("ATF Report was not government work product" because it was "maintained for broader purposes than the prosecution of Fahie.") (internal citations omitted); *Binks Mfg. Co. v. National Presto Industries, Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983) ("A more or less routine investigation . . . is not sufficient to immunize an investigative report developed in the ordinary course of business."); *Allen v. Chicago Transit Auth.*, 198 F.R.D. 495, 499 (N.D.Ill. 2001) (Even if litigation is imminent, "there is no work product immunity for documents prepared in the ordinary course of business rather than for litigation purposes.").

Washington courts have similarly held that police reports qualify under the business record exception to the hearsay rule. *See, e.g., State v. Bellerouche*, 129 Wn.App. 912, 917, 120 P.3d 971 (2005) ("Police reports may be business records" under ER 803(a)(6).); *State v. Ecklund*, 30 Wn.App. 313, 319 n.4, 633 P.2d 933 (1981) ("police reports are admissible if the report is made in the regular course of police business and it is the regular course of police business to keep such a report"); *see*

also, e.g., *State v. Iverson*, 126 Wn.App. 329, 339–40, 108 P.3d 799, 803 (2005) (jail booking records are “business records” where witnesses were familiar with the booking system and used it to record data in the regular course of business); *State v. Heggins*, 55 Wn.App. 591, 596, 779 P.2d 285 (1989) (autopsy report deemed business record); *State v. Plewak*, 46 Wn.App. 757, 764, 732 P.2d 999 (1987) (same for fire communication report).

The police reports and other documents withheld here were the same types of records created in the regular course of police business addressed in these cases. There is no question that, on their own, they would be discoverable. They cannot be withheld from disclosure simply because they were transmitted in bulk to the prosecutors office.

**b. Withholding Police Reports Created by Third-Parties, Absent Some Selection Process, Is Not Consistent With FOIA Case Law.**

When interpreting the PRA, Washington courts seek guidance from federal cases interpreting parallel exemptions under the federal Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. *See Limstrom*, 136 Wn.2d at 608. FOIA cases that consider work product withholding regularly require the proponent to show some selection process from which one could discern the attorney’s mental impressions or legal theories the privilege is designed to protect.

In *Shapiro v. U.S. Department of Justice*, the government attempted to withhold as work product documents in a “Brief Bank” that was “only accessible by DOJ personnel” and “maintained on an intranet

website.” 969 F.Supp.2d 18, 32 (D.D.C. 2013). *Shapiro* held such a FOIA exemption was improper:

Just as every document prepared by an attorney is not entitled to work product protection, not every compilation by an attorney is protected either. A crucial factor in determining whether the work-product doctrine applies to a compilation is whether the attorney’s selection of the contents could reveal or provide insights into the “mental processes of the attorney” in the analysis and preparation of a client’s case. . . .

*Id.* at 32. *Shapiro* compared instances where “compilations” could warrant protection—“when the act of culling, selecting or ordering documents reflects the attorney’s opinion as to their relative significance in the preparation of a case or the attorney’s legal strategy”—against those that do not—where compiled documents “merely reflect information, which is already or may be available to an adversary, or has no implications for the adversary process.” *Id.* (citing and quoting *SEC v. Strauss*, No. 09 Civ. 4150, 2009 WL 3459204, \*10 (S.D.N.Y. Oct. 28, 2009) (“‘Shared access to the electronic working paper database’ did not create work-product concern since this ‘would not identify the type of coherent, consciously arranged, static set of documents’ subject to work-product protection, but only reveal a list of documents that the adversary viewed on ‘ad hoc’ basis.”) (unpublished)).

In *American Management Services, LLC v. Department of the Army*, by contrast, the court found, in the context of a FOIA request, that “invoices, emails, and internal reports” exchanged between the Army and an outside corporate counsel “are confidential work product because, as a

result of their selection and inclusion in the binder, they reflect what . . . outside counsel believed most relevant.” 842 F.Supp.2d 859, 881-82 (E.D. Va. 2012); *see also Cities Service Co. v. F.T.C.*, 627 F.Supp. 827, 834 (D.D.C. 1984) (FTC’s “meetings with representatives of the oil companies and an actual record of what transpired would not be considered work product, [but] the weighing and sifting of relevant facts as highlighted in each author’s notes surely do constitute work product”).

Other federal circuit authority, outside the FOIA context, supports the principle that work product should involve some actual selection or compilation process, rather than the mere rote “gathering” that the Prosecutor’s Office engaged in here. *In re Grand Jury Subpoenas, March 19, 2002 and August 2, 2002*, for instance, the Second Circuit rejected a work product claim with respect to subpoenaed bank records held by a law firm representing persons suspected of wrongdoing under the Foreign Corrupt Practices Act. 318 F.3d 379, 382 (2d Cir. 2003). The Second Circuit held, in reliance on *Hickman*:

Not every selection and compilation of third-party documents by counsel transforms that material into attorney work product. To fit within what we have repeatedly characterized as a “narrow exception” to the general rule that third-party documents in the possession of an attorney do not merit work product protection, the party asserting the privilege must show a real, rather than speculative, concern that counsel’s thought processes in relation to pending or anticipated litigation will be exposed through disclosure of the compiled documents[.]

*Id.* at 383, 386 (internal citations and quotation marks omitted); *see also Willingham v. Ashcroft*, 228 F.R.D. 1, 7 (D.D.C. 2005) (synopsis of

adverse actions taken by DEA against attorneys, drafted by the Office of Attorney Personnel Management for personnel purposes, was not protected because “this is not a case involving the selection and reliance upon a few documents, from a sea of thousands of documents produced in discovery”); *compare Sporck v. Peil*, 759 F.2d 312, 315-17 (3d Cir.1985) (citing *Hickman* to hold work product applied to “selection process of defense counsel in grouping certain documents together out of the thousands produced”); *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 661 (D. Nev. 2013) (“documents collected by the client at the request of and for use by outside counsel” were work product because “file represents the selection and compilation of the documents by [outside counsel]”).

**c. The Municipal Police Records Here Would Be Discoverable In Civil Litigation.**

“RCW 42.56.290 . . . exempts from public disclosure “[r]ecords 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.” *Soter*, 162 Wn.2d at 731 (quoting RCW 42.56.290).

This exemption from public disclosure “relies on the rules of pretrial discovery to define the parameters of the work product rule for purposes of applying the exemption.” *Limstrom*, 136 Wn.2d at 605. “Any materials that would not be discoverable in the context of a controversy under the civil rules of pretrial discovery are also exempt from public disclosure under RCW 42.56.290.” *Soter*, 162 Wn.2d at 731.

“Washington courts are required to evaluate the specific parties and their expectations in order to determine whether the materials sought were prepared in anticipation of litigation.” *Overlake Fund v. Bellevue*, 60 Wn.App. 787, 796-97, 810 P.2d 507 (1991) (citing *Heidebrink*, 104 Wn.2d 392). CR 26(b)(4) does not shield documents prepared in the ordinary course of police work, especially by non-County investigators, simply because they were placed in a prosecutor’s file. “If materials are produced in the ordinary and regular course of a discovery opponent’s business, and not to prepare for litigation, they are outside the scope of the work product doctrine.” Fed.R.Civ.P. 26(b)(3) (advisory committee notes).<sup>2</sup>

*Overlake Fund* undercuts Defendant’s claim. There, Bellevue’s “Design and Development Department” reviewed a request by a land developer for a zoning variance (60 Wn.App. at 789-90), and “recommended denial of Overlake’s proposal after Overlake had warned the City in its letters that a denial would constitute an unconstitutional taking.” *Id.* at 795. Though the court found a “controversy” existed, it denied work product production because it was “not satisfied that the

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<sup>2</sup> Though some legal authority cited here in support of Plaintiffs’ position is federal, Washington courts look to federal law in interpreting the parameters of the work product doctrine and PRA exemptions. *See Heidebrink*, 104 Wn.2d at 396; *Washington State Dept. of Transp. v. Mendoza de Sugiyama*, 330 P.3d 209, 215 (2014) (“Our state PRA is modeled after . . . FOIA. Because of this fact, we often look to judicial constructions of the FOIA in construing our own statute.”). Federal Rule of Civil Procedure 26(b)(3) is identical to its Washington law counterpart, CR 26(b)(4).

requested documents would ‘not be available ... under the rules of pretrial discovery.’” *Id.* (alteration in original) (quoting CR 26(b)(4)).

In *United States v. Fort*, the Ninth Circuit addressed the discoverability of investigative police reports in the criminal context, when prepared by local law enforcement and then passed to federal prosecutors. 472 F.3d 1106 (9th Cir. 2007). In deciding that such third-party police reports, when in the federal prosecutor’s possession, need not be produced under Federal Rule of Criminal Procedure 16, the Ninth Circuit expressly distinguished the limited scope of the civil work product doctrine, as codified in Federal Rule of Civil Procedure 26(b)(3). *Id.* at 1115. *Fort* stressed that the “distinction between the work product doctrine and Rule 16(a)(2) is . . . illustrated by the differing treatment of investigative reports. Under the work product doctrine, *police reports are rarely protected.*” *Id.* at 1116 (emphasis added) (citing *Miller v. Pancucci*, 141 F.R.D. 292, 303 (C.D.Cal.1992); 6 James Wm. Moore *et al.*, Moore’s Federal Practice § 26.70(c)(iii) (2006)).

In *Pancucci*, the court compelled discovery of the San Bernardino Police Department’s internal investigation file, which, like the subject matter of the PRA request here, included “memoranda, notes, writings, tape recordings, photographs, charts, diagrams, transcripts and physical evidence relating to [an] incident” of alleged use of excessive force. 141 F.R.D. at 303. There, similar to the independent reason for Fife’s and Lakewood’s reports, police made reports for the “purpose of conducting

complete, objective investigations and for making fair, impartial evaluations of complaints against police department personnel.” *Id.*

*Pancucci* concluded: “Citizen complaints are investigated by Internal Affairs regardless of whether litigation is anticipated. It is done in the regular course of business . . . . Documents prepared in the regular course of business do not fall under ‘work product’ and thus are not immune from discovery.” 141 F.R.D. at 303. The uncontroverted evidence contained here in the Lakewood and Fife officers’ Declarations is that those police departments also would have investigated the office-involved shooting, irrespective of the Prosecutor’s Office’s actions.

The ample authority cited above establishes that the withheld police reports, audio and video recordings, and other documents would be available in pre-trial civil discovery, for instance in civil rights lawsuits under 42 U.S.C. § 1983. *See, e.g., McCloskey v. White*, No. 09cv1273, 2011 WL 6371869, \*3 (N.D. Ohio Dec. 20, 2011) (no protection because “police reports and surveillance video created during routine traffic stops and during other routine law enforcement activities”) (unpublished); *Joseph v. Las Vegas Metropolitan Police Dept.*, No. 09cv966, 2011 WL 846061, \*3 (D. Nev. Mar. 08, 2011) (compelling production of “police reports provided to the district attorney’s office”) (unpublished); *cf. Heath v. F/V ZOLOTOTI*, 221 F.R.D. 545, 549 (W.D.Wash. 2004).

Defendant’s interpretation of *Limstrom*, if followed to its logical conclusion, would mean that in civil litigation generally parties could claim work product protection in regard to all investigative reports,

witness statements, and other documents routinely prepared by police or others prior to litigation—just because those documents are in a government lawyer’s file. Any time a person filed suit—for instance in a police misconduct case, or tort action against a municipality arising out of an accident where police investigated—government attorneys inevitably would obtain police reports (or if death occurred, the coroner’s report) before discovery commenced.

Under the logic of Defendant’s theory, simply taking possession of such documents, even if independently created and publicly available, would impart work product protection. The perverse result would be that a litigant would have to resort to PRA requests made directly to the city rather than exchanging such reports through civil discovery.

Unless one can infer some selection or compilation process by Pierce County prosecutors, there is no reason that the documents are immune from discovery. *See In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1016 (1st Cir. 1988) (holding work product protection not afforded where “the lawyer has had no justifiable expectation that the mental impressions revealed by the materials will remain private”).

**d. “Work Product” Protection Should Not Attach Because Police Records Were Transferred *En Masse* to the Prosecutor’s Office.**

If police investigative files cannot be considered work product on their own, then they cannot be transformed into privileged material where, as here, the Prosecutor’s investigator, Keith Barnes, simply took all the

documents uploaded to the RMS, or received as complete hardcopies, and moved them into the Prosecutor's file. As mentioned, because Mr. Barnes did not sift through the submitted documents, selecting some, but discarding others, production of the documents will reveal nothing about any mental impressions within the Prosecutor's Office.

As illustrated in *Hickman*, federal FOIA cases, and Washington business records and civil discovery jurisprudence, it makes no sense to cloak such records in work product protection by virtue of their location. Such application of the rule does not comport with an exemption "narrowly construed" under the PRA or with the narrowly tailored evidentiary privilege allowed only in derogation of the search for the truth.

**4. Even If Work Product Applied, Plaintiffs Had A Substantial Need For the Requested Records and Could Not Obtain The Same Information Elsewhere.**

A trial court's decision to compel production of documents under CR 26(b)(4) is reviewed for abuse of discretion. *See Demelash v. Ross Stores, Inc.*, 105 Wn.App. 508, 519, 20 P.3d 447 (2001). "Abuse is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Hertog v. City of Seattle*, 88 Wn.App. 41, 47, 943 P.2d 1153 (1997).

In the event a court designates withheld material as legitimate "work product" under CR 26(b)(4), a party may still "obtain discovery of documents and tangible things otherwise discoverable . . . only upon a showing that the party seeking discovery has substantial need of the

materials . . . and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”

As to the “substantial need” showing here, the trial court rejected Plaintiffs’ reasoning that the Prosecutor’s refusal to make documents available, before it announced its decision not to file charges on September 4, 2013, “denied Plaintiffs the opportunity to inform themselves” about the circumstances of their son’s death. CP 219. The trial court also found Plaintiffs “fail[ed] to explain why they could not have retrieved the documents directly from the law enforcement agencies.” *Id.*

Unlike other jurisdictions, such as King County, where evidence about the justifications for officer-involved shootings are publicly aired, the Pierce County Prosecuting Attorney’s Office has chosen to determine whether a police officer has committed (un)justified homicide behind closed doors, in secrecy, without a family’s opportunity to even test the officers’ account of what happened. This chosen policy necessarily highlights the importance of the PRA in securing people’s access to public documents from which prosecutors will make this decision. Notwithstanding the trial court’s ruling, Plaintiffs’ need for the information was not just substantial; it was compelling—they were trying to learn why the police had killed their son.

Plaintiffs also could not obtain the requested documents, or even any substantially equivalent information, from another source. At the time they made their PRA request to the Prosecutor’s Office on August 5, 2014,

Annalesa and Fredrick Thomas had but one avenue to obtain documents relevant to their son's death—from the Prosecutor's Office directly. The municipal police agencies had blocked access to the records, rejecting Plaintiffs' records requests and claiming an "open and active" law enforcement investigation under RCW 42.56.240. *See* CP 159-62.

At oral argument, Plaintiffs explained that Defendant's Exemption Log did not indicate when the Lakewood officers uploaded their document onto RMS, *see* RP 29:7-16, and that the Prosecutor's Office later refused to divulge—again based on claimed work product privilege—when the document transfer occurred. RP 30:5-31:1. This information might have provided clues about when the case was referred to prosecutors so as to vitiate the categorical exemption for investigative records under RCW 42.56.240 with respect to the municipal police agencies, thereby potentially allowing Plaintiffs alternative access to the records. *See Cowles Pub. Co. v. Spokane Police Dept., City of Spokane*, 139 Wn.2d 472, 479, 987 P.2d 620 (1999) (law enforcement's categorical exemption ceases to exist "where the suspect has been arrested and the matter referred to the prosecutor").

As it happened, at the time of the August 5, 2013 request, Plaintiffs did not know whether, or when, the municipal agencies had referred any case to the Prosecutor's Office. Plaintiffs only had the request denial letters. CP 159-62. It was not till later, well after the Prosecutor's Office denied Plaintiffs' renewed request on October 5, 2013, that some of the municipal police agencies began responding Plaintiffs' PRA requests. But

even to this day, Plaintiffs have yet to receive everything, including such critical documents as the audio recordings of the officer interviews following the shooting and video taken of the shooting scene. RP, 25:15-26:3.

#### **F. CONCLUSION**

The Court should hold that the investigative reports, witness interviews, audio and video recordings, evidence inventories, and other documents at issue here—those routinely and independently created by third-party municipal police agencies in the ordinary course of their business—fall outside work product protection and should have been produced in Defendant’s PRA response. Work product protection cannot reasonably apply to such documents simply because they were transferred *en masse* into the prosecution’s possession. The Court should clarify *Limstrom* and require that a proponent of work product protection for such documents must show that its attorney or agent engaged in some actual selection or compilation process, the disclosure of which would reveal the kind of mental processes the rule was designed to shield.

In the alternative, even if the Court finds work product protection can apply, the Court should reverse the trial court’s ruling that Plaintiffs did not make the “substantial need” showing under CR 26(b)(4) for the records requested here.

The Court should remand to the trial court with an instruction that it order the withheld records be produced, and that Plaintiffs be awarded appropriate attorneys’ fees and penalties for the wrongful withholding.

DATED this 10<sup>th</sup> day of November, 2014.

Respectfully submitted,

MacDONALD, HOAGUE & BAYLESS

By *s/David Whedbee*  
David Whedbee, WSBA # 35977  
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Attorneys for Appellants

### DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 10, 2014, I arranged for filing the original of the foregoing Appellants' Opening Brief with the Supreme Court of the State of Washington; and arranged for service of a copy of the same on the parties to this action as follows:

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Mailing Address: PO Box 40929		
Olympia, WA 98504-0929		

Daniel R. Hamilton	<input type="checkbox"/>	Facsimile
Deputy Prosecuting Attorney	<input checked="" type="checkbox"/>	Messenger
Pierce County Prosecutor's Office	<input type="checkbox"/>	U.S. Mail
955 Tacoma Avenue South, Suite 301	<input checked="" type="checkbox"/>	E-Mail
Tacoma, WA 98402-2160		
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DATED this 10<sup>th</sup> day of November, 2014, at Seattle, Washington.

s/Terri Flink  
Terri Flink, Legal Assistant

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Attached for filing into Case No. 90195-3 – Thomas v. Pierce County, WA Prosecuting Attorney's Office is Appellants' Opening Brief, which is being submitted by Appellants' attorney, David Whedbee, WSBA # 35977. Mr. Whedbee's contact information is: MacDonald Hoague & Bayless, 705 2<sup>nd</sup> Avenue, Suite 1500, Seattle, WA 98104; 206-622-1604; [davidw@mhb.com](mailto:davidw@mhb.com).

As indicated in the Certificate of Service attached to the brief, Respondent's counsel of record, Daniel Hamilton, is being served a paper copy of the document via legal messenger.

Thank you,

**Terri Flink | Legal Assistant  
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