No. 93562-9

SUPREME COURT OF THE STATE OF WASHINGTON

KITTITAS COUNTY,

Respondent,

v.

SKY ALLPHIN, et al.,

Petitioners.

BRIEF OF AMICI CURIAE WASHINGTON COALITION FOR OPEN GOVERNMENT, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, AND THE SPOKESMAN-REVIEW

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I. IDENTITY AND INTEREST OF AMICI

The Washington Coalition for Open Government ("WCOG"), a Washington nonprofit organization, is an independent, nonpartisan organization dedicated to promoting and defending the public's right to know in matters of public interest and in the conduct of the public's business. WCOG's mission is to help foster open government processes, supervised by an informed and engaged citizenry, which is the cornerstone of democracy. WCOG represents a cross-section of the Washington public, press, and government. Its board of directors exemplifies this diversity. WCOG is the state's freedom of information association, Washington citizens' representative organization on the National Freedom of Information Coalition, and a champion of the public's right of access in its educational programs and in court.

ACLU-WA is a statewide, nonpartisan, nonprofit organization with over 50,000 members, dedicated to the preservation and defense of constitutional and civil liberties. ACLU-WA supports the right of any member of the public to promote government transparency and accountability through public records requests. ACLU-WA is also a leading proponent of informational privacy. Where both interests are implicated, ACLU-WA believes that the two competing civil liberties are most prudently evaluated on a case-by-case basis to achieve the purpose of

the Public Records Act ("PRA") with minimal harm to legitimate privacy interests.

The Spokesman-Review is a news company that produces a daily newspaper and website. The newspaper is published in Spokane and distributed in 10 counties in Eastern Washington and North Idaho. The news company regularly reports on actions, policy and decision-making involving public agencies, public officials and public employees.

The interest of WCOG, ACLU-WA and The Spokesman-Review in this case stems from the public's strong interest in timely access to accurate and complete information concerning the conduct of government and in maintaining government accountability to the people of the state of Washington. WCOG, ACLU-WA, their members, and The Spokesman-Review believe that state and local agencies exercise their authority by consent of the governed, and therefore have a duty to conduct their activities in a transparent and open manner. Access to public records under the Public Records Act, Chapter 42.56 RCW ("PRA") is an essential tool of transparency that should be protected and encouraged. WCOG, ACLU-WA, and The Spokesman Review have a legitimate interest in assuring that the Court is properly briefed on important issues involving the PRA.

II. STATEMENT OF THE CASE

WCOG, ACLU-WA and The Spokesman-Review rely on the facts set forth in the briefs of the parties and the opinion of the Court of Appeals below.

III. ARGUMENT

A. The County and the Department of Ecology were *not* on the same "legal team."

The trial court found that the County and the Department of Ecology were on the same "legal team." CP 973. Petitioners challenged this theory in their appeal. *App. Br.* at 24-26. Affirming, the Court of Appeals used the phrase "legal team" only descriptively, when discussing the trial court decision and addressing the petitioners' argument that the County and Ecology did not have a common interest because the County sued Ecology. *Kittitas County v. Allphin*, 195 Wn. App. 355, 369-370, 381 P.3d 1202 (2016). The Court of Appeals did ***not*** hold that the County and Ecology were on the same legal team. *Id.*

WCOG and ACLU agree with the petitioners that the County and Ecology were not on the same "legal team" as that phrase was used in *Soter v. Cowles Publ'g Co.*, 161 Wn.2d 716, 174 P.3d 60 (2007) (noting that attorneys for school district and private investigator hired by those attorney were one legal team). *Soter* did not involve multiple agencies or

the common interest doctrine. This case is about whether communications between the County and Ecology, which are separate agencies with separate attorneys, were properly withheld from petitioners under the common interest doctrine.

The County does not disagree. The County's *Answer* argues that the records are exempt under the common interest doctrine, but that argument is not based on the notion that the County and Ecology were on the same "legal team." Indeed, the phrase "legal team" is never used in the *Answer*. The Court should clarify that the County and Ecology were not on the same "legal team" under *Soter*.

B. The issue is whether the records at issue are exempt as attorney work product under a narrow interpretation of RCW 46.56.290 and the "common interest" doctrine.

The common interest doctrine is not a separate PRA exemption or expansion of the attorney-client or work product privileges. As this Court stated in *Sanders v. State*, 169 Wn.2d 827, 853, 240 P.3d 120 (2010), the common interest doctrine is merely an exception to the doctrine of waiver that applies to the PRA.[1] If the records at issue are work product, and if the "common interest" doctrine, narrowly interpreted, applies to avoid

[1] This Court's decision in *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010), does not provide much guidance in this case because the only issue addressed in Sanders was whether the common interest doctrine applied at all. As the Court of Appeals noted in this case, the *Sanders* opinion provides no information about the nature of the records, what agencies they were shared with, or the nature of the relationship between the agencies. *Kittitas County*, 195 Wn. App. 355, 368 n.5.

waiver, then the records are exempt under RCW 42.56.290.

It is important to note that this case is not a discovery dispute. This is a PRA case. Under the PRA, all exemptions must be narrowly construed, and the Court must take into account the PRA's policy "'that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.'" *Progressive Animal Welfare Soc'y v. Univ. Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (quoting former RCW 42.17.340(3)). In addition, the County has the burden to prove that the exemption in RCW 42.56.290 applies to each record that it has withheld. RCW 42.56.550(1).

As stated in *Sanders*, the common interest doctrine is an exception to doctrine of waiver. The only purpose of a common interest agreement is to allow parties that have a common legal interest to share confidential information, in pursuit of that common interest, that parties could not or would not share in the absence of an agreement to maintain confidentiality. Conversely, the only effect of finding a common interest agreement in a PRA case is to allow an agency to withhold otherwise non-exempt public records. Therefore, under a narrow interpretation of RCW 46.56.290 and the "common interest" doctrine, the agency must prove that the parties ***agreed*** to share confidential information and to maintain such

confidentiality. *U.S. v. Gonzalez,* 669 F.3d 974, 979-980 (9th Cir. 2012) (upholding claim of common interest where attorney for defendant testified that parties agreed to share confidential information); *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) (rejecting claim of common interest where there was no evidence of any agreement).

The County and Court of Appeals note that RCW 70.105.005(10) creates a collaborative relationship between Ecology and the County. *Kittitas County*, 195 Wn. App. at 369 n.6; *Resp. Br.* at 47.[2] That fact supports a finding that the County and Ecology have a common legal interest in taking regulatory action against petitioners. But that fact alone does not establish that any common interest ***agreement*** was ever made, because nothing in RCW 70.105.005(10) requires Ecology and the County to share confidential information or to agree to confidentiality.

> [A] shared desire to see the same outcome in a legal matter is insufficient to bring a communication between two parties within this exception. Instead, the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement—whether written or unwritten. (Citations omitted).

In re Pacific Pictures Corp., 679 F.3d at 1129.

If the County proves that a common interest agreement was made then the County must also prove several other elements of the common

[2] The reference to "Ch. 79.50 RCW" in the County's *Answer* at 5 appears to be a typo.

interest doctrine with respect to each record. First and foremost, the County must prove that the records actually contain work product. RCW 42.56.290 does not allow an agency to withhold other types of records or to agree to withhold other types of records. WCOG, ACLU and The Spokesman-Review take no position on whether the particular records at issue in this case are actually work product at all, but note that the petitioners dispute this element. *See App. Br*. at 22-24.

The County must also prove that the other elements of the common interest doctrine are met:

> (1) the communication was made by separate parties in the course of a matter of common interest or joint defense; (2) the communication was designed to further that effort; and (3) the privilege has not been waived.

Avocent Redmond Corp. v. Rose Electronics, Inc., 516 F. Supp. 2d 1199, 1203 (W.D. Wash. 2007). Again, WCOG, ACLU and The Spokesman-Review take no position on whether each of these elements has been proven with respect to each record that the trial court found to be exempt.

C. The common interest doctrine requires an agreement to maintain confidentiality, which may be lacking in this case.

The entire point of the common interest doctrine is to allow parties who share confidential information in pursuit of a common legal interest. *Avocent Redmond Corp.*, 516 F. Supp. 2d at 1202. No common interest relationship is created unless and until the agency proves that the parties

agreed to share confidential information and to maintain confidentiality. *Avocent Redmond Corp.*, 516 F. Supp. 2d at 1203. In the absence of an agreement to share confidential information the parties have only a "shared desire to see the same outcome in a legal matter," which is not sufficient. *In re Pacific Pictures Corp.*, 679 F.3d at 1129.

WCOG, ACLU-WA and The Spokesman-Review question whether the County has proven (or could prove on remand) that the County and Ecology ever entered into a common interest agreement. The trial court's memorandum decision did not find that any oral agreement was actually made. The trial court merely noted that there was no written agreement. CP 973.

Similarly, the Court of Appeals never found that any common interest agreement was made. The Court of Appeals stated that "a written agreement was not required because the record demonstrates the two agencies agreed to undertake a joint/common cause in the regulatory enforcement litigation against Chem–Safe." *Kittitas County*, 195 Wn. App. at 369. But this finding that the County and Ecology agreed to take joint enforcement action does ***not*** establish that the parties also agreed to share confidential information and to keep such information confidential, which is an essential element of the common interest doctrine.

WCOG, ALCU and The Spokesman-Review take no position on whether the County has proved that a common interest agreement was made or on whether that issue should be decided by this Court or remanded. Those matters should be addressed by the parties.

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RESPECTFULLY SUBMITTED this 30th day of January, 2017.

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