

Soter, et al. v. Cowles Publishing Company

No. 78574-1

Majority by Bridge, J.

Dissent by C. Johnson, J.

No. 78574-1

C. JOHNSON, J.(dissenting)—The majority erroneously expands the scope of what have been narrow exemptions to the public disclosure act, formerly chapter 42.17 RCW. In doing so the majority fails not only to effectuate the mandate of the act, but also expansively denies disclosure in this case where, both legally and factually, no basis exists to withhold disclosure. The majority essentially creates a public nondisclosure act, turning the act inside out so that documents are withheld from the public unless the public can demonstrate that no remotely connected litigation exists, past, present, or future. The result of this broad, expansive extension of what should be and have been narrowly crafted exemptions, is well

beyond the exemptions' intended parameters, past any meaningful limitation, ultimately encouraging public agencies to hide public records from the public.

CONTROVERSY EXEMPTION

The majority correctly recites the statutory provision, RCW 42.56.290 (formerly RCW 42.17.310(1)(j) (2004)), exempting 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 superior courts.” The majority misapplies the exemption in this case in two respects. First, at the time the investigator conducted the interviews no controversy or legal action existed. Second, at the time the superior court considered the disclosure request, the controversy was over.

The plain language of the statute requires that an agency be a party to a controversy before the exemption applies. Here, the documents sought consist of the investigator’s interview notes with individuals who have or might have some knowledge of the underlying incident. In this case, the

investigator conducted witness interviews the weekend after the incident, well before any claim was brought. The fact that later a claim was brought by the parents should not be a basis to broadly expand the statutory exemption beyond its purposes. Similarly, once the controversy is over, as occurred in this case, the exemption should no longer apply.

We should recognize the purposes underlying this statutory exemption and narrowly apply it only where those purposes exist. The exemption exists to protect the public, and the public agency, in those instances where disclosure of public records would negatively impact the public interest in the course of litigation or in resolving a legal controversy. Applying the exemption in this narrow context makes sense where disclosure would somehow benefit someone in pursuing a claim against the public. However, where no controversy exists, or where the controversy has ended, these purposes are no longer implicated.

Sadly, under the majority's broad application of the exemption to the facts of this case, public agencies will be encouraged to request their counsel to hire investigators to look into incidents, the result being that all

those public records are exempt from disclosure forever, even where no controversy exists. The majority simply misapplies the statutory exemption to this case where no controversy exists.

WORK PRODUCT EXEMPTION

Separate from the statutory controversy exemption, but in many respects similar, is the judicially created “work product” exemption. The majority in its extensive analysis of this exemption expands the exemption far beyond any limitation. The majority’s result is inconsistent with the holdings of our cases recognizing the narrow limitations of the exemption.

The foundation and parameters for the work product exemption was extensively discussed and analyzed in *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998). In *Limstrom* we emphasized that the work product exemption does not extend to cover all written materials prepared and obtained by counsel with an eye toward litigation. *Limstrom*, 136 Wn.2d at 610. We held in *Limstrom* that the exemption is intended to protect either communications between an attorney and client, or materials that reveal an attorney’s thoughts, strategies, or mental impressions, relevant to

representing or communicating with an agency. We did not hold the exemption was intended to protect materials containing factual information of public interest and mandated for disclosure under the act. Work product is not an absolute protection from disclosure, particularly in the context of the broad mandate for public access to agency documents.

The documents in this case were created by an outside investigator hired to objectively uncover the facts surrounding the incident. Because materials were created prior to threat of litigation, the interview and witness in no way reflect an attorney's inner mental impressions and thoughts. In this case, the closest an attorney was to any of the records sought is that the law firm representing the school district hired the investigator who conducted the interviews. Responses to questions about "who are you?" and "what do you know about the incident?" in no way reflect the type of matter the exemption was intended to protect.

In many ways, the investigator's notes are similar to the police reports we determined were disclosable in *Cowles Publishing Co. v. Spokane Police Guild*, 139 Wn.2d 472, 987 P.2d 620 (1999). There, as in this case,

the investigator (a police officer) took statements from witnesses concerning an incident. The statements were prepared for the attorney's review and potential use, if relevant to the proceeding. Here, as in *Cowles*, we have similar factual recitations prepared by an investigator, none of which should be exempt from disclosure.

This is similar to the situation in *Limstrom* where this court sent the requested files back to the trial court for an in camera review to determine what portions, if any, were to be redacted from the prosecutor's files containing narrative field reports, arrest reports, court documents, and notes of deputy prosecutors. This review was to be conducted within the purposes of the act "to ensure the sovereignty of the people and the accountability of the governmental agencies that serve them." *Limstrom*, 136 Wn.2d at 607. We found, in keeping with the mandate to narrowly construct exemptions to the act, that it was not appropriate to broadly interpret the work product exemption to cover everything in the files.

In this case, the majority leaps to the conclusion that, because the district's attorneys hired the investigator, then automatically the investigation

Cause No. 78574-1

notes must be protected by attorney work product exemption. This conclusion is unsupported by our prior cases and disregards our responsibility to apply exemptions narrowly. The Court of Appeals should be reversed.

AUTHOR:

Justice Charles W. Johnson

WE CONCUR:

Justice Tom Chambers

Justice Richard B. Sanders

Justice James M. Johnson
