

Hon. Ronald E. Culpepper



03-2-06879-4 20086804 MMS 11-25-03

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COUNTY CLERK'S OFFICE

A.M. NOV 25 2003 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

FILED  
IN COUNTY CLERK'S OFFICE

A.M. NOV 25 2003 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

Jane Doe,

Plaintiff,

NO. 03 2 06879 4

vs.

Pierce County, a political subdivision of the  
State of Washington, et al.,

Defendants.

MEMORANUDM IN SUPPORT OF  
PIERCE COUNTY'S SECOND MOTION  
TO STRIKE AND IN RESPONSE TO  
PLAINTIFF'S REPLY MEMORANDA

NOTE ON MOTION CALENDAR:  
DECEMBER 5, 2003

I. INTRODUCTION

Under the guise of opposing Pierce County's motion to strike, plaintiff files a memorandum randomly arguing new issues concerning the County's underlying motion to dismiss as well as including therewith both additional inadmissible declarations, see 11/5/03 P's Reply; Supp. Dec. Rodriguez; Dec. of Young, as well as more unauthenticated and improper attachments. See P's Ex. "A2"-Ex. "Q." For the reasons stated below, both plaintiffs' first and second set of submissions should be stricken and plaintiff's public disclosure claim dismissed as a matter of law.

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## II. ANALYSIS

### A. PLAINTIFF'S SUBMISSIONS ARE IMPROPER AND SHOULD BE STRIKEN

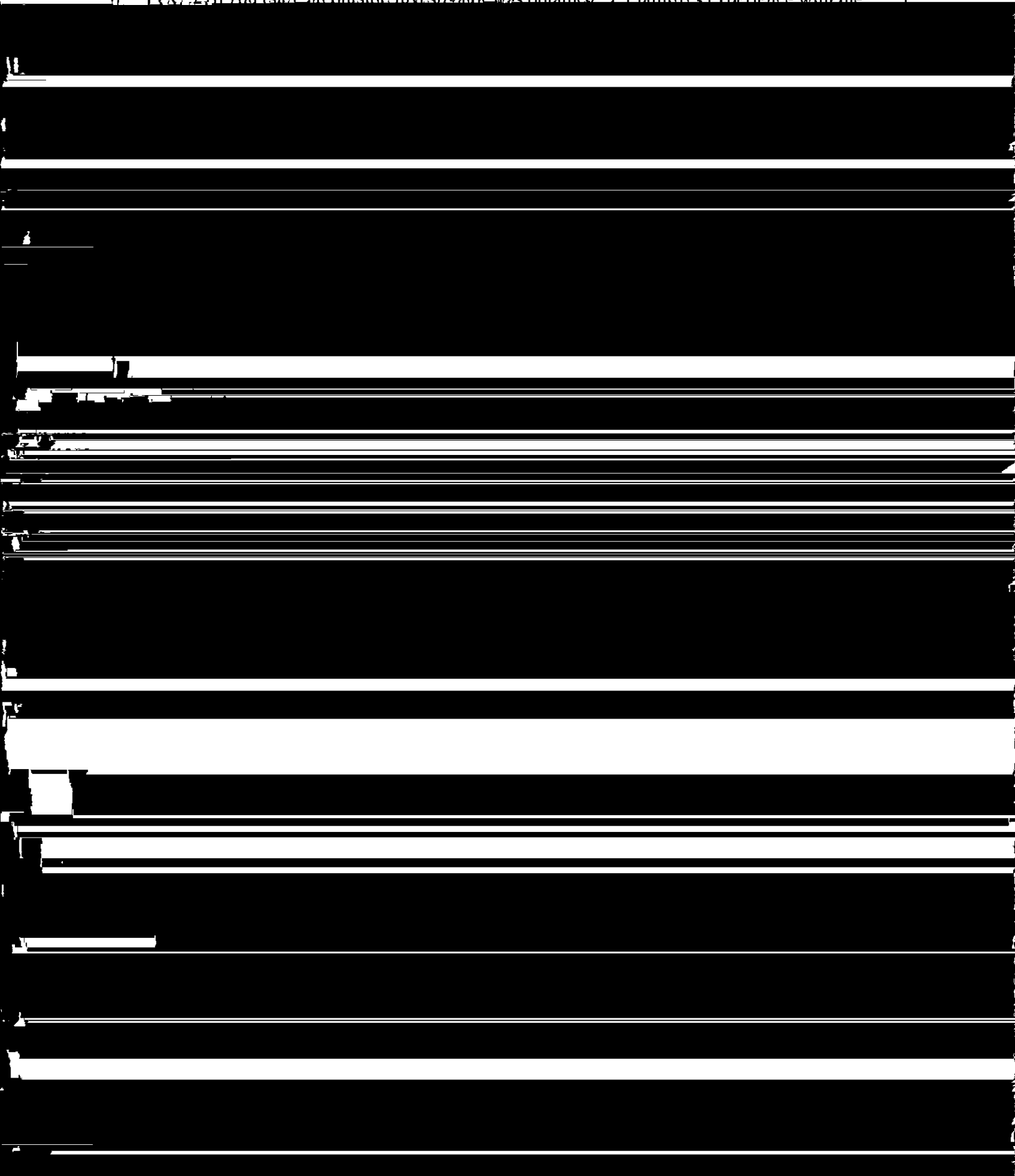
#### 1. Plaintiff Has Not Corrected Defects Raised By First Motion To Strike

Plaintiff does not attempt to resist the striking of her first declaration's improper attempts to argue fact and law. See 10/13/03 Rodriguez Dec. (i.e. significance of the prosecutor's denial letter, id. at 3, that "victims of Human Rights abuses by Pierce County ... should not be given less rights to public disclosure," id. that "it is obvious" from the documents of record "that they were not the sort of attorney client privileged documents that should have been withheld," id. at 4, that the protected documents should "not become some sort of secret records" that she "should have to start a lawsuit in order to see," id., and that "Defendant's claim is a sham." Id.) On other issues, however, plaintiff does oppose the motion to strike -- but does so without addressing the actual grounds upon which the motion was made.

Hence, the County's earlier motion to strike initially noted that the first Rodriguez declaration "does not 'show affirmatively' . . . that she has any 'personal knowledge' upon which to base her claim as to whether or not 'lawyers were involved in the commencement of the investigation'." See 10/16/03 Cy's Memo. Re Mot. To Strike, at 3. In reply, plaintiff submits a supplemental declaration describing how the County usually processes complaints of workplace discrimination -- such are investigated by "the County's EEO Officer, Personnel Director, or other person designated by the Personnel Director." See 10/27/03 Supp. Rodriguez Dec., p. 1. Of course here the "EEO Officer" was the complainant and the "Personnel Director" was the subject of the investigation, and therefore neither could conduct the investigation and the "usual" program for investigating complaints did not apply. See Id. at 2 ("Since the complaint involved myself and Ms. Sawyers, and we are the ones who appear in

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PCC 3.16.180 [sic] an outside investigator was obtained.") Plaintiff's experience with the



1 hardly relevant as to whether such privileges exist and may be asserted in the instant dissimi-  
 2 lar public disclosure action. Prior litigation strategy in a civil action is neither "relevant" un-  
 3 der ER 402 nor a fact "as would be admissible in evidence" under CR 56.

4 Finally, plaintiff responds to the County's motion to strike her attachment of a news-  
 5 paper article by now claiming she can "personally attest" the "articles were from the Olym-  
 6 pian." See 10/27/03 Supp. Rodriguez Dec., at 2. However, even if such resolved the authen-  
 7 ticity problem, it does nothing to correct the problems of hearsay and relevance. See State ex  
 8 rel Pierce County v. King County, 29 Wn.2d 37, 45 (1947)("newspaper articles are hearsay  
 9 and inadmissible as evidence to prove the truth of the statements contained therein."); In Re  
 10 Pirtle, 136 Wn.2d 467, 473 (1998)(newspaper articles properly stricken as "hearsay and in-  
 11 competent evidence."); Larez v. City of Los Angeles, 946 F.2d 630, 642 (9th Cir. 1991)  
 12 ("newspaper articles have been held inadmissible hearsay as to their content."). See also State  
 13 v. Evans Campaign Comm., 86 Wn.2d 503, 507 (1976)(the repetition of hearsay to oppose  
 14 summary judgment "does not create a material issue of fact."); Charbonneau v. Wilbur Ellis  
 15 Co., 9 Wn.App. 474, 476 (1973)(same). Indeed, nowhere does plaintiff even attempt to ex-  
 16 plain how the subject of the article -- i.e. a Thurston County trial court's decision concerning a  
 17 different type of investigation by a different entity under different circumstances -- has any  
 18 relevance here. See e.g. State v. Fitzpatrick, 5 Wn.App. 661, 668 (1971)(even unpublished  
 19 opinions of the appellate courts "do not become a part of the common law of the state of  
 20 Washington" and "should not be considered in the trial courts."); RCW 2.06.040.

23 Accordingly, the County's first motion to strike should be granted in its entirety.

24 2. New Submissions Are Likewise Inadmissible And Also Should Be Stricken

25 Of course, for the same reasons stated above, defendant now also moves to strike

1 plaintiff's newest improper supplemental submissions that: 1) repeat baseless assertions that  
2 the investigation of her complaint did not involve legal counsel, 10/27/03 Supp. Rodriguez  
3 Dec., at 1-2; 2) claim that in a prior discrimination suit the County provided discovery of an  
4 investigatory report, id.; P's Ex "A2:" Young Dec.,; and 3) include newspaper articles and  
5 pleadings in a non-binding Thurston County case concerning a different type of investigation  
6 by a different entity under different circumstances. See P's Ex. "A3"-Ex. "Q."

8 B. PLAINTIFF DEMONSTRATES NO GROUND TO DENY MOTION TO DISMISS

9 In responding to the County's motion to strike, plaintiff inappropriately also takes the  
10 opportunity to make new arguments as to why its public disclosure claim should not be dis-  
11 missed. See 11/5/03 P's Reply, at 3-10. Plaintiff's newest arguments opposing the County's  
12 motion to dismiss, to the extent they can be deciphered, also are baseless.

13 First, plaintiff appears to argue that the original retention letter to the investigator by  
14 the prosecutor asking the former "to assist me by investigating the above referenced matter,"  
15 see Supp. Greer Dec., does not necessarily refer to work product just because it is expressly  
16 entitled "RE: Attorney Work Product." See 11/5/03 P's Reply at 3-4. Of course, it is not how  
17 the letter was "labeled" that shows it was "work product," but rather the undisputed fact it was  
18 written contemporaneously by the prosecutor to retain the investigator to "assist me by inves-  
19 tigating the above referenced matter." See Cy's Ex. "F:" 5/23/02 Greer Letter. Further, the  
20 unique subject line of a letter -- unlike "boiler plate" recitations at the end of faxes -- reflects  
21 the author's belief as to what that particular document involves and establishes here that the  
22 expectation of those involved was that the project for which the investigator was being re-  
23 tained would be "Attorney Work Product."

25 Second, plaintiff argues the report cannot be work product because she somehow as-

1 serts it "was an effort to comply with the Pierce County Code." See 11/5/03 P's Reply at 4.  
 2 However, as demonstrated above and as admitted by plaintiff's own declaration, PCC  
 3 3.16.080 did not apply because here plaintiff was the "EEO officer" and the subject of her  
 4 complaint was the "Personnel Director," so that the ordinary process could not be used. See  
 5 10/27/03 Supp. Rodriguez Dec., at 1-2. Though Barry v. USAA, 98 Wn.App. 199, 207-208  
 6 (1999) held there is "no work product immunity for documents prepared in the regular course  
 7 of business," it also held that "[i]n determining whether particular materials were prepared in  
 8 anticipation of litigation or in the regular course of business, the trial court looks to the spe-  
 9 cific parties involved and the expectations of those parties." (Emphasis added). Here, it is  
 10 undisputed that the report was produced outside the ordinary course of the Personnel Depart-  
 11 ment's business and for purposes of preparing for litigation by the Prosecutor's Office who  
 12 retained an investigator with the expectation the investigator would "assist [it] by investigat-  
 13 ing the above referenced matter." See Cy's Ex. "F:" 5/23/02 Greer Letter. See also Greer Aff;  
 14 Supp. Greer Aff.; Sawyer Aff.

16 Third, plaintiff relies on inapplicable principles pertaining to "insidious discrimina-  
 17 tion," the right to access one's own personnel file (i.e. RCW 4.12.240 & 49.12.250), and the  
 18 "Fair Credit Reporting Act." See 11/5/03 P's Reply at 4-6, 9. Though plaintiff for example  
 19 argues that "in the employment context . . . investigations are the subject of the lawsuit," id. at  
 20 6, the instant action is not a suit for discrimination, does not involve Ms. Rodriguez's person-  
 21 nel file and does not raise a violation of the Fair Credit Reporting Act -- it simply is a Public  
 22 Disclosure Act suit. See Complaint; Sawyer Aff. Indeed, plaintiff herself previously in-  
 23 formed this Court that she "is not pursuing litigation against Pierce County, except for the  
 24 present lawsuit." See 10/13/03 P's Memo. Opposing S.J., at 2. When plaintiff's brief finally  
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1 actually addresses the Public Disclosure Act, she cites statutory exceptions not raised by de-  
 2 fendants (i.e. RCW 42.17.310(1)(ee)), and relies on inapplicable citations to lower court cases  
 3 from other jurisdictions that involved different facts and different exceptions under those  
 4 state's different statutory schemes. See Daniels v. City of Commerce City, 988 P.2d 648, 650  
 5 (Colo. App. 1999)(Colorado's "personnel records," "public interest" and "law enforcement"  
 6 exceptions found inapplicable, though if "any of these records in fact are privileged by reason  
 7 of the attorney/client privilege or work-product privilege . . . then those particular records  
 8 shall be submitted to the Court under seal for an in-camera inspection by the Court to deter-  
 9 mine whether or not a valid privilege would protect the disclosure of the particular record.");  
 10 Fincher v. State, 231 Ga. App. 49, 497 S.E.2d 632 (1998) (where no work product privilege  
 11 raised, it was proper to disclose report affirmatively finding misconduct). See also 11/5/03 P's  
 12 Reply, at 5-6, 9.

14 Nowhere, however, does plaintiff address Dawson v. Daly, 120 Wn.2d 782, 791  
 15 (1993) – expressly cited in the County's letter declining to produce the report and in its an-  
 16 swer, see Cy Ex. "D;" Answer, at 3<sup>1</sup> – that holds the public disclosure act "incorporates the  
 17 work product doctrine as a rule of pretrial discovery" and "is triggered prior to the official  
 18 initiation of litigation" where litigation is "reasonably anticipated." Such alone requires  
 19 summary judgment on plaintiff's public disclosure claim for non-disclosure of the Prosecutor's  
 20 consultant report. See e.g. The Overlake Fund v. City of Bellevue, 70 Wn.App. 789, 792-94  
 21 (1993) (report of consultant retained by municipal counsel and relied upon "to enable the City  
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 24 <sup>1</sup> Though the work product privilege and other exceptions also were expressly asserted in the answer to plain-  
 25 tiff's complaint, see 5/12/03 Answer, at p. 3, the County is not limited just to these previously stated exemptions  
 because where a governmental entity claims an exemption in its initial response to a public disclosure request,  
 even if its initial "stated reasons for refusing disclosure were invalid, it could argue at the show cause hearing the  
 information is deletable for other reasons." Cowles Publishing Co. v. City of Spokane, 69 Wn.App. 678, 683,  
rev. denied, 122 Wn.2d 1013 (1993).

1 to evaluate its potential liability" was protected from public disclosure as "work product.")

2 Similarly plaintiff nowhere directly addresses the second ground for non-disclosure of  
3 RCW 42.17.310(1)(d) – also expressly cited in the County's letter declining to produce the  
4 report and in its answer, see Cy Ex. "D;" Answer, at 3 – which exempts "[s]pecific intelli-  
5 gence information and specific investigative records compiled by investigative . . . agencies, .  
6 . . . the non-disclosure of which is essential to effective law enforcement or for the protection  
7 of any person's right to privacy." Plaintiff does at least cite Brouillet v. Cowles Pub. Co., 114  
8 Wn. 788 (1990), and superficially asserts "investigations into public employee misconduct  
9 have long been subject to public disclosure." 11/5/03 P's Reply, at 4. However, plaintiff ig-  
10 nores that 1) Brouillet involved records of teacher certificate revocations, 2) in contrast the  
11 instant report finds no misconduct, and 3) "[r]elease of files dealing . . . with complaints  
12 which were later dismissed, will constitute a more intrusive invasion of privacy than would  
13 the release of files relating only to a complete investigation which resulted in some sanction  
14 against the officers involved." Cowles Publishing Co. v. State Patrol, 109 Wn.2d 712, 725  
15 (1988)(emphasis added). See also City of Tacoma v. Tacoma News Tribune, 65 Wn.App.  
16 140, 146-151 (1992)(investigative reports were exempt from disclosure because the right to  
17 privacy is violated by, and the public has no legitimate interest in, disclosure of information  
18 that is unsubstantiated after reasonable efforts to investigate it.) Further, plaintiff ignores that  
19 Brouillet has expressly been found inapplicable to the disclosure of employee records "which  
20 do not discuss specific instances of misconduct [because such] is presumed to be highly of-  
21 fensive . . . ." Brown v. Seattle Pub. Sch., 71 Wn.App. 613, 616-18 (1993)(school principle's  
22 personnel records should not have been ordered disclosed because such violated his right to  
23 privacy). As the mandatory in camera inspection will show, the consultants' report finds no  
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