

**Court of Appeals No. 31404-5-II**

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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**Jane Doe,**  
Appellant,

v.

**Pierce County,**  
Respondent.

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On Appeal from Pierce County Superior Court,  
The Honorable Ronald Culpepper

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**MOTION OF APPELLANT**

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Counsel for Appellant  
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1. Identity of Moving Party: The Appellant, through her attorney, requests the relief designated in Part 2 below.

2. Relief Requested Appellant moves on the merits to reverse, to supplement the record, to remand to the trial court or for other relief consistent with the motion; and for fees and costs on appeal.

**Note: The next sections cite proposed supplemental WHRC documents just disclosed pursuant to WAC 162-04-030 and RCW 42.17.310(1)(ee)).**

3. Facts/Procedural History Contrary to the Respondents' arguments that the withheld public records in this proceeding are exempt "work product" and "law enforcement" records which would be harmful if disclosed to the public, it is clear from the records themselves (just obtained from the public files of the WHRC, who had received them from the Respondents in October 2002), that, in April, 2002, the Appellant alleged several types of misconduct involving the Personnel Director of Pierce County government, including claims of a hostile work environment and retaliation. Such accusations were typically investigated by the Appellant or an independent contractor, at the request of the Personnel Director, but because the Appellant had alleged misconduct by the Personnel Director herself, the Personnel Director contacted Deputy County Executive/Chief of Staff, Lyle Quasim, concerning

the need to do the county's EEO investigation. SUPP CP. 19, 21, 30 ("once Rodriguez used the words 'retaliation' and 'hostile work environment,' in her 4/12/02 memo, the charges had to be investigated"), 34, 54 (EEO Officer "Work Expectations"), 74 (Sawyers memo to Lyle Quasim). Eventually, on August 30, 2002, the investigation was completed, and Lyle Quasim reported: "In conjunction with the Prosecutor's Office, we retained Kristina Moris of the Washington Firm to investigate your allegations... I will relay the conclusions of the investigation to you by this letter." (emphasis added) Supp. CP 19.

In September 2002, the Appellant filed a complaint for state and federal employment discrimination with the Washington Human Rights Commission (WHRC). Supp. CP. 82-83. In turn, on September 28, 2002, the WHRC notified the Respondent of the complaint and a WHRC investigation. As the WHRC explained, "The focus of the investigation will be the allegations raised in the complaint, but it may not be confined only to the treatment of the Complainant." SUPP. CP. 84. The request for a written response does not compel the Respondent to disclose any work product.

On October 4, 2002, Pierce County waived its work product privilege and disclosed the completed county investigation and other public records to the WHRC. Supp. CP. 1-81. “Because the complaint was about [County Personnel Director Betsy] Sawyers, Sawyers referred the matter to her superior, Deputy County Executive Lyle Quasim. Kristina Moris was retained to conduct a thorough and impartial investigation into the allegations. As part of the investigation, Ms. Moris conducted interviews with [sixteen] employees of the Personnel department. She also reviewed documentation provided by both [the Appellant] and the Personnel Department.” (emphasis added) Supp. CP. 2.

There are no references to “work product” or withheld records in any of the documents provided to the Human Rights Commission. The Respondent only redacted the social security numbers from the payroll records it provided to the WHRC, consistent with public disclosure rules. Supp. CP. 36. The investigator, Kristina Moris, claimed on the first page of her report that her investigation was the result of the Personnel Director asking her supervisor, Lyle Quasim, for further action. Supp. CP. 9. While the report is completely silent as to the alleged work product,

the “this is a EEO investigation” theme which the Appellant tried to explain to the trial court and the Court of Appeals in the present case is repeated again and again in the report, where the Personnel Director is quoted as claiming that the claims of hostile work environment and retaliation “triggered” an objective investigation at the behest of the Personnel Director to Lyle Quasim; and “Sawyers could not investigate them herself because she was the alleged offender. In her role, Rodriguez should be expected to know this. Mr. Quasim, as Sawyers’ supervisor, was the logical person to whom to refer the matter.” (emphasis added) Supp CP. 11, 30.

On October 24, 2002, the Appellant submitted a request to the Respondent for disclosure of the public records, CP. 52, and the Respondents replied on October 28, 2002, denying the request on the specific ground that the investigation purportedly found no misconduct. CP. 53. On November 22, 2002, the Appellant submitted a second request with newspaper clippings she had apparently found on October 30, 2002, establishing that Kitsap County Judge Leonard Costello had found that such documents were public records and fully discloseable regardless of the finding

of no misconduct. CP. 54-60. After a lengthy period of non-disclosure, despite the first and second demand, the Appellant initiated this action.

The Respondents moved for summary judgment, supported by declarations stating that every public record requested by the Appellant was exempt “work product.”

The County claimed to the trial court in this case that it had preserved the report and other documents in the prosecutor’s files as “work product” obtained for purposes of litigation, although Denise Greer, the lawyer who filed a declaration in support of the work product claim, failed to disclose that she had actually already sent the complete records in response to a third party request (the WHRC), along with her own personal analysis of the report. Supp. CP. 2-7. Ms. Greer also failed to disclose in her declaration that she was identified by name as a fact witness in the report, which contains absolutely no legal analysis or speculation as to litigation. Supp. CP. 32. That report given to the WHRC has a listing of numerous public records that the Personnel Department gave to the investigator (Supp. CP. 9-10) as well as copies of several public records which the attorney said were “provided by both Ms.

Rodriguez and the Personnel Department.” Supp CP. 2. Finally, the attorney argued in favor of the employer’s Faragher/Elleth defense to the WHRC, alleging, “When Ms. Rodriguez raised her concerns of discrimination and retaliation, the Deputy Executive, in coordination with my office, took prompt action to have her concerns thoroughly investigated by a fair and impartial investigator. The Washington Firm has concluded that the findings do not support Ms. Rodriguez’s allegations” (emphasis added) Supp. CP. 6-7.

Contrary to the alleged need for secrecy as to all records because they could reveal a possible litigation strategy and thought process (which the Respondent argued in pleadings against public disclosure), the Respondents’ attorney had already promised the WHRC that “I would be more than happy to provide additional information or documentation, if appropriate, to any specific allegations or questions you may have. Please feel free to call me at (253) 798-7748. Sincerely, Denise Greer.” Supp. CP. 7.

The Appellant herself tried to argue in her declarations that the work product argument was a “sham” (CP. 50) and that the investigation was actually the sort of investigation done by Pierce

County in the regular course of its business and pursuant to its mandatory role as a public employer investigating workplace misconduct. CP. 50, 95. As the Appellant pointed out, workplace investigations into misconduct can always be labeled “work product” under the “anticipation of litigation test” but the statute provides that the documents (both the investigator’s report and the public records provided to the investigator) would not be work product if they were otherwise discoverable. At the very moment the public disclosure request was received, and later when this court and the trial court received signed pleadings from Respondents’ counsel, the Respondent and its counsel certainly knew that the documents were no longer work product, and discoverable.

At oral argument on the motion for summary judgment, the trial court pointed out from reading the newspapers that “sometimes [governments] cover up stuff” and a dialog ensued:

Mr. Hamilton: Certainly, and the Court has to look at that on a case by case basis based on the record in front of it. The Court doesn’t have in front of it a record that comes near to that.

I don’t know where else one could present to the Court to show reasonable anticipation of litigation, other than magic words by people who deal in the law making these assertions by a letter that actually retains the investigator that says “assist me.” And who is the “me”? The “me” is the deputy prosecuting attorney who is investigating a complaint of employment violations.

The Court: That's part of the concern. Can you now hide everything that would otherwise be discloseable because you get the prosecutor or an attorney involved in it and the work product - -

Mr. Hamilton: I don't know about everything else, Your Honor, but this isn't a matter of hiding; this is work product. And should litigation occur, and what privileges can be waived? In all honesty, this report is very favorable to - - in its conclusions here. But the point is, it's work product.

And should litigation occur and discovery be made, those privileges can always be waived in litigation. But at this point in public disclosure act requests, that work product, you can't just come in and say let me look through the prosecutor's files for your investigation of this, and in the same way, they can't ask to look through private attorney's files - -

The Court: Well - -

Mr. Hamilton: - - the same - -

The Court: - - in the files - -

Mr. Hamilton: Well, this is in our files, and this is retained by - -

The Court: You are the one looking though it and pulling it out, not them.

Mr. Hamilton: Yes, Your Honor. They are requiring us to look through our file and disclose it.

RP 12-13.

Later in the proceedings, the Respondent's attorney argued that the prosecutor was the sole source of public records that went to the investigator, and therefore the work product exemption precluded even identifying those documents. "As soon as we identify what it is that [the Washington Firm] considered, we disclosed work product...and then you have just destroyed the work product exemption." RP. 34.

After the motion for summary judgment was granted, and this appeal ensued, the Respondents continued the charade in this court by clamoring repeatedly in their pleadings (the Brief of Respondent) that this case involved "disclosure of documents held

in a public attorney's files" (Brief at 6), and that the records would not be available to the public unless, and until, the prosecutor elected that to use them as a defense to discrimination. Pierce County invited this court to look at the "expectations" of the parties at the time the records were requested (October and November 2002), because these were the "prosecutor's files" and these records were "confidential" and disclosure would "harm" and "non-disclosure of this investigative report is essential for the protection of both various rights to privacy as well as the investigatory process itself. Respondent's Brief, *passim*. Reviewing the evidence just disclosed, the Respondents in truth had already copied and sent the report and several attachments, together with a blatant Ellerth/Faragher "prompt and thorough" investigation defense to a state agency in order to head off that agency's looming investigation and possible charges against the Respondent. The matter is before this court.

4. Argument The appellate court may, on its own motion or on motion of a party, affirm or reverse a decision or any part thereof on the merits in accordance with the procedures of RAP 18.14. Moreover, RAP 9.11(a) allows this court to consider additional

evidence and/or remand for further proceedings if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court. In addition, appellate courts may waive the requirements of RAP 9.11 or any other appellate rule in order to serve the ends of justice, pursuant to RAP 1.2 and RAP 18.8. Washington Federation of State Employees v. State, 99 Wn.2d 878, 884-85, 665 P.2d 1337 (1983). Finally, RAP 18.7 incorporates the CR 11 requirements that an attorney's document filed in the Court of Appeals is well grounded in fact. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 829 P.2d 1099 (1992).

As noted favorably by the Washington Supreme Court:

Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense.

Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299 (1993)(quoting Schwartz, Sanctions Under the New Federal Rule 11 – A Closer Look, 104 F.R.D. 181, 205 (1985).

A case like the present one occurred in Burka v. United States Dept of Health & Human Services, 87 F.3d 508 (DC Cir. 1996), in which an appellate court allowed supplementation of the appellate record with undisputed evidence which showed that allegedly non-discoverable FOIA requested documents had already been disclosed to third parties.

### **Why the Public Does Not Trust Lawyers**

Under RAP 10.3, reference to the record must be included for each factual statement. What happens, however, when a Respondent uses the “work product” argument as a shield against public records disclosure, and a shield against trial judges and the appellate court, knowing they have already secretly waived the alleged work product to third parties. Here, it is transparent that the Respondents are improperly arguing that they cannot allow an invasion of their attorneys’ files, and that Respondents want this court to rule that they have not yet decided whether to waive such an invasion by disclosing the records to anyone. Their lawyers

presented this argument by using classic CR 11 misdirection. In essence, the Respondents filed declarations and argued the records were “work product” in April 2002, but led the court to believe that the files remained purely work product until the day of the public disclosure request and, in fact, until the day the Brief of Respondent was filed.

These claims of “work product” are a matter of trust which this court and the trial court must place in lawyers who assert the privilege. Throughout these proceedings, the lawyers for Respondent knew that they had actually opened up the investigation to public scrutiny when they sent out copies of its alleged “work product” to the WHRC without asserting any sort of privilege. What protections do the Rules of Appellate Procedure provide to an Appellant, a trial court and a Court of Appeals who are induced to rely upon a Respondent whose counsel cannot produce accurate statements in response to direct inquiry? Hopefully RAP 9.11 or some other rule or policy in this court corrects situations like this, and it won’t happen in future public disclosure cases which will undoubtedly arise with this Respondent.

Here, the Respondents filed a declaration in the trial court and argued during oral argument to Judge Culpepper and in a brief filed in this court, that its records are protected “work product” which it created for purposes of litigation. Since the claim effectively foreclosed the trial court and Appellant and this court from ever being able to see the records or question the rubber stamp of “work product,” the Respondents’ lawyer can arguably make all public records unassailable by claiming “work product.” In such cases, there should be a heightened duty on the part of a government attorney not to obfuscate whether it has already waived such a claim to the government’s public records.

Utilizing the peculiar degree of circumspection allowed when a party claims “work product” and/or “attorney-client privilege,” the Respondents’ counsel led the trial court, upon specific inquiry, into believing that the Respondents were not “hiding” any public records under the label of “work product” because the Respondents had not yet used them as a defense to the Appellant’s discrimination complaint, and instead the “work product” records had not yet been disclosed beyond their own attorney’s files. This was the ultimate issue during oral argument to the trial court. The Respondents

explained that the Appellant here was essentially asking “to look through private attorney’s files.” The Brief of Respondent clearly seeks to perpetuate the myth that Pierce County had not yet decided to open up its files, boldly proclaiming “as a matter of law, a party in a civil suit can elect not to waive a privilege and thereby simply choose to forego the use of the evidence in that action.” (emphasis in original) Brief of Respondent, at 4. In other words, the Respondents were misrepresenting to this court that they had not yet elected to waive any claim to “work product” when, in truth, that very decision had been made before the Appellant submitted her public disclosure request. Unfortunately, only the Respondents knew that truth, and in the final analysis – the Respondents calculated that telling the truth would be more expensive than withholding it from whatever court the Appellant went to for help. The Appellant suggests that now is the time for this court to act.

The Washington Supreme Court signaled its disgust with this sort of potential abuse of the “work product” and “attorney-client privilege” exceptions, pointing out that if an agency prepares a document for a purpose other than communicating with its attorney and then claims the document is protected, it exposes itself to a

bad faith claim. Hangartner v. City of Seattle, 151 Wn.2d 439, 90 P.3d 26 (2004).

In the present appeal, after all briefing had been filed in this matter, the WHRC closed its investigation into the Respondent's employment practices on September 30, 2004, and delivered a copy of the Human Rights Commission's public records concerning the Appellant's complaint on October 6, 2004 (the Commission had previously identified the list of other open and closed discrimination investigations involving Pierce County) for purposes of public disclosure. See 10/14/2004 Declaration of Christopher Bawn.

Included within the public records disclosed by the Human Rights Commission was a batch of the Respondents' falsely-alleged "work product" records, as well as the cover letter prepared by the Respondents' attorney clearly claiming that it was using the investigator's report as an Ellerth/Faragher good faith investigation into the misconduct cited by the Appellant. A simple review of these records, including the self-serving cover letter, demonstrates that the Respondents engaged in the sort of "work product" sleight of hand by lawyers that should not be tolerated in the trial courts

and in the appellate courts of this state on such fundamental issues as public disclosure.

Unlike some accidental claim by a poor, overworked public records officer in some small government office who failed to comprehend the language concerning the importance of public disclosure and its limited exemptions, the Respondents' lawyer in this case first responded incorrectly (no mention of work product), then failed to respond at all to the Appellant's requests in October and November, then when the matter moved to the trial court, the lawyer concocted the sophisticated all-or-nothing "work product" and "law enforcement" why-we-have-to-keep-the-file-sealed arguments, without disclosing that the Respondents' lawyer had actually produced the records and signed statements to lead other government officers (the WHRC) to reach an opposite conclusion concerning the records. In sum, the Respondents should not be allowed to stand by their claim that this investigation was exclusively "work product" which might be waived in the future when in truth it was already waived before they received the request for disclosure. This motion clearly merits more than a perfunctory dismissal under RAP 9.11's test. The fundamental

purpose of that rule should be to protect people from lawyers who can cloak their files and claim a privilege that was clearly not applicable at the time the right to public and judicial inquiry was invoked. The Washington Supreme Court has attempted to explain the “ethical” obligation not to misrepresent or remain silent concerning facts in the context of claiming that public records are nondiscloseable:

The Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request.

The [public disclosure] statute explicitly mandates that: Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.

(Italics ours.) RCW 42.17.310(4). Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. See Fisons, 122 Wn.2d at 350-55. Moreover, without a specific identification of each individual record withheld in its entirety, the reviewing court's ability to conduct the statutorily required de novo review is vitiated.

PAWS v. UW, 125 Wn.2d 243 (1994)(citing Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299 (1993)).

The work product rule can protect materials prepared in anticipation of litigation. Dreiling v. Jain, 151 Wn.2d 900, 93 P.2d 861 (June 2004)(citing Limstrom v. Ladenburg, 136 Wn.2d 595, 613, 963 P.2d 869 (1998)). However, the supreme court in Dreiling explained that

courts have repeatedly held that the automatic application of the work product rule is lost when the underlying records are disclosed to a third party. Dreiling (ordering disclosure of records given to special litigation committee that were being sought by shareholders in a derivative action) (citing Joy v. North, 692 F.2d 880, at 893-94 (2d Cir. 1982), cert. denied, 460 U.S. 1051 (1983)); accord State v. Pawlyk, 115 Wn.2d 457 (1990)(once a criminal defendant puts on an insanity defense, the work product doctrine does not provide protection from disclosure of a psychiatrist's report); accord McKesson HBOC, Inc. v. Superior Court, 115 Cal. App. 4<sup>th</sup> 1229 (2004), review denied, 2004 Cal. Lexis 4902 (Cal. 2004) (corporation's law firm which prepared internal audit report and interview memoranda, volunteered the records in a SEC investigation, thereby making them discloseable to third parties); accord, United States v. Bergonzi, 216 F.R.D. 487, 497 (N.D. Cal. 2003) (finding that McKesson gave up work product protection by sharing materials with the government); accord Tennessee Laborers Health & Welfare Fund v. Columbia/HCA Healthcare Corp., 293 F.3d 289, 302-03 (6<sup>th</sup> Cir. 2002), cert. dismissed, 539 U.S. 977 (2003) (waiver of the protections afforded by the work

product doctrine is a tactical litigation decision, there is no reason to transform the work product doctrine into another "brush on the attorney's palette" to be used as a sword rather than a shield)(citing Westinghouse v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991)). As the court explained in Westinghouse:

When a party discloses protected materials to a government agency investigating allegations against it, it uses those materials to forestall prosecution (if the charges are unfounded) or to obtain lenient treatment (in the case of well-founded allegations). These objectives, however rational, are foreign to the objectives underlying the work-product doctrine.

Here, before the Appellant had even filed her public records request, the Respondents had already handed the investigation and attachments over in an effort to forestall the WHRC or federal EEOC from investigating, entering findings or initiating charges against the Respondent on behalf of the State of Washington or the United States. Notably, the Respondents never labeled the investigation and other records as work product and nothing in the records seems to fit the sort of internal "attorney thought process" or memoranda that the Respondents claim was exempt from public disclosure. The record below suggests that the Respondents had continuously treated all the records as protected "work product" – a claim that is clearly untenable.

The Respondents or their counsel in this matter have engaged in the sort of “bad faith” the Washington Supreme Court was concerned about. Although the Respondents claim that the public disclosure request was “invading” the attorney’s files and thought processes, thus precluding even a mere “listing” the documents involved, the attorneys’ formal response to the WHRC and all the attachments reflect no concern of invasion. The report and other requested records were clearly a non-exempt public record in October 2002, and just as clearly a part of the regular county investigative process which was triggered by the complaint of discrimination and retaliation.

Looking at the records, it is obvious that the “internal thought process,” disclosure of legal analysis, or fear of harm arguments appearing in Respondents’ pleadings are merely another subterfuge. In any event, the PAWS decision emphasizes that the duty is upon the Respondents to individually identify the records being withheld in addition to citing a specific exemption. Here, the Respondents absolutely refused to do that, placing the onus on the Appellant to figure out what was going on behind the Respondents’

“work product” cloaking language presented to herself, her attorney, and the judges involved in this case.

The Appellant here argues, consistent with RAP 9.11, that this matter cannot be fairly resolved without supplementation, since the Respondents have continued to misrepresent the status of the alleged “work product” throughout this proceeding to the trial court and this court. Moreover, the additional evidence clearly changes the decision being reviewed as it establishes that the work product privilege was already waived when the Appellant made her public disclosure request. Here, it is equitable to excuse a party's failure to present the evidence, since the Respondents have adamantly averred that they had not decided to use the documents in an Ellerth/Faragher context (when in fact they were already being used for that exact purpose) and claimed an unqualified protection from disclosure. Although the Appellant can attempt to return to the trial court for relief, the record on review has been completely developed at Appellant's expense and a decision from this court would expedite review of the issue. If this court believes the Appellant should attempt to return to the trial court before obtaining relief from this court, then a pointed remand would be appropriate,

rather than simply issuing a RAP 9.11 denial and then reaching the tainted record. Moreover, renewing the same argument to the trial court would be inadequate as long as the Respondents continue to refuse to disclose whatever public records they retain by falsely maintaining that they have kept the records in their files, pending litigation, because the Respondents have demonstrated in other published appellate decisions (and during oral argument in this case) to expect appeal unfavorable public disclosure rulings from trial judges. The Respondents will have effectively forestalled litigation of the discrimination and retaliation by playing hide-the-ball in this public disclosure case. Clearly, it would be inequitable to the Appellant to affirm the lower court solely on the evidence presented in the trial court. There appears to be no inequity to the Respondent to reverse the trial court's decision, however.

The Respondents' true actions, if properly disclosed when the trial court and this court were asking for the truth, would have clearly resulted in a favorable ruling that the records were discoverable in litigation and therefore public records under Washington law. As noted in a lengthy list of frequently-followed authorities provided below, courts have found that it is unfair for a

party to claim that it conducted an appropriate investigation (which the new evidence demonstrates the Respondent has unequivocally attempted to do) because that compels inquiry by the finder of fact into the timeliness, thoroughness, and employer bias demonstrated by the investigation. Peterson v. Wallace Computer Services, Inc., 984 F.Supp. 821, 826 (D. Vt. 1997)(“Peterson’s ability to present evidence on these dimensions of Wallace’s investigation would be impaired severely were the notes and memoranda produced in the course of the investigation not disclosed to her.”)<sup>1</sup>

<sup>1</sup> For numerous added authorities on this point, see Long v. Anderson University, 204 F.R.D. 129 (S.D. Ind. 2001) (discrimination investigation with counsel’s advice throughout the process was a result of the university’s harassment policy, thus as an ordinary and customary step in conducting its business and threat of litigation if the potential claims were not resolved creating the mere anticipation of litigation does not shield the documents from production); Peterson v. Wallace Computer Services, Inc., 984 F.Supp. 821 (D. Vt. 1997)(documents prepared in anticipation of litigation attorney-client and work product rights waived when Wallace defended itself based upon the adequacy of its investigation); McGrath v. Nassau County Health Care Corporation, 204 F.R.D. 240, 246 (E.D.N.Y. 2001)(“it is unfair to McGrath to allow NHCC to invoke the *Faragher-Ellerth* defense while at the same time protecting the documents NHCC itself has put at issue”); Worthington v. Endee, 177 F.R.D. 113, 118 (N.D.N.Y. 1998)(Defendants claimed the investigation was not a remedial measure but was conducted “solely to deal with the anticipated litigation following plaintiff’s notice of claim,” but the County administrator had cited the investigation in his deposition as a step the County had taken to remedy the hostile work environment. In ruling that the entire investigation report and notes prepared by outside counsel had to be produced to plaintiff, the court said,

“Realistically, the remedial measures were the investigation, the report, and any action taken as a result thereof. Therefore, the advice that the defendants received via the entire report, including the notes of the investigation, are relevant in determining what corrective actions, if any, were taken, and whether they were sufficient to placate plaintiff’s allegations of hostile work environment.”); Johnson v. Rauland-Borg Corporation, 961 F.Supp. 208, 211 (N.D.Ill. 1997)(granting discovery of the advice Defendant received from an investigating attorney); Frontier Refining Inc. v. Gorman-Rupp Co., Inc., 136 F.3d 695, 704 (10th Cir.1998) (“a litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion.”); E.E.O.C. v. Gen. Tel. Co. of Northwest, 885 F.2d 575, 578 (9th Cir. 1989), cert. denied, 498 U.S. 950 (1990)(when an employer voluntarily uses evidence of its EEO efforts to prove nondiscrimination, it opens the door and waives whatever qualified privilege may have existed to prevent the admission of self-critical materials); In re Comumbia/HCA Healthcare Corp. Billing Practices, 293 F.3d 289, 302 (9<sup>th</sup> Cir. 2002), cert. den. 124 S.Ct. 27 (2003)(“we reject the concept of selective waiver, in any of its various forms” - voluntary disclosure of privileged materials to the government constitutes a waiver of the attorney-client and work product protection against disclosure to other adversaries); Waiver of Privilege By Disclosure, Draft Recommendation of the California Law Revision Commission (June 2004)(recommending to codify the common law in California waiving work product protection to documents voluntarily disclosed to third parties); Blanchard, The Faragher–Ellerth Affirmative Defense as Implied Waiver of Privileges: Is the Defense a Shield or Double Edged Sword?, 14 S. Carolina Lawyer 38, 40-41 (2003) (“the trend of cases has continued to find that an employer cannot rely on its investigation of harassment or discrimination conducted by its legal counsel while at the same time shielding the investigation from discovery); Hammons, Ethics and Discovery Issues After Faragher and Ellerth, 71 Ok. Bar J. #2 (2000)(“an employer who relies on an investigation as a defense will not be successful in asserting a privilege against full disclosure”).

5. Conclusion This court should grant the requested relief.

Dated this 13th day of October, 2004.  
Respectfully submitted,

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**Christopher W. Bawn, WSBA 13417**

I certify that on October 13, 2004, I served a true and correct copy of the Motion to Supplement via U.S. Mail to the attorney of record, along with copies of the proposed Supplemental Court Papers: Declarations of Chris Bawn and Tanya Callahan, WHRC to Daniel Hamilton or other Prosecuting Attorney, Pierce County Prosecutor's Office/Civil Division, 955 Tacoma Ave. South, Suite 301, Tacoma, Washington 98402-6732.

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CHRISTOPHER W. BAWN, WSBA #13417