KING COUNTY DISTRICT COUT OF WASHINGTON
WEST DIVISION

INQUEST INTO THE DEATH OF: DAMARIUS DEMONTA BUTTS, Defendant.	No. 517IQ8013 FAMILY OF THE DECEASED MOTION OPPOSING PROTECTIVE ORDER RE: DISCOVERY MATERIALS

I. INTRODUCTION

The mother of Damarius Butts, by and through counsel Adrien Leavitt and Sadé Smith of the King County Department of Public Defense, Northwest Defenders Division, object to imposition of a Protective Order proposed by the City Attorney.

II. ISSUE

1) Whether the inquest administrator should order imposition of the City Attorney's broad proposed Protective Order that seeks inhibit the transparent review Mr. Butts' death in opposition with the explicit purpose of an inquest when, under the rules governing inquests in King County, dissemination of discovery is already strictly prohibited.

KING COUNTY DEPT OF PUBLIC DEFENSE
NORTHWEST DEFENDERS DIVISION
710 SECOND AVENUE, SUITE 250
SEATTLE, WA 98104

III. ARGUMENT

1) The Administrator should not impose the overbroad proposed Protective Order because the City Attorney has not met it's burden to overcome the constitutional presumption of open courts

   a. *Washington State's strong open court doctrine applies to inquest proceedings and the City Attorney bears the burden of persuading the inquest administrator that access must be restricted to prevent a threat to an important interest.*

The Washington State Constitution requires that "[j]ustice in all cases shall be administered openly." CONST. art. 1, § 10. "Our founders did not countenance secret justice." Dreiling v. Jain, 151 Wn.2d 900, 908, 93 P.3d 861, 866 (2004). "[O]perations of the courts and the judicial conduct of judges are matters of utmost public concern." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 839 (1978). "Open access to government institutions is fundamental to a free and democratic society. Open access to the courts is grounded in our common law heritage and our national and state constitutions. For centuries publicity has been a check on the misuse of both political and judicial power." Dreiling, 151 Wn.2d at 908.

The constitutional open court doctrine guarantees the public and the press a right of access to judicial proceedings and court documents in both civil and criminal cases. Cohen v. Everett City Council, 85 Wn.2d 385 (1975). "The right of access to judicial records, like the openness of court proceedings, serves to enhance the basic fairness of the proceedings and to safeguard the integrity of the fact-finding process." Republic of Philippines v. Westinghouse Elec. Corp., 139 F.R.D. 50, 56 (D.N.J.1991) (citing Press–Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984)).

The purpose of the constitutional open courts doctrine is to resist proceedings cloaked in secrecy, which foster mistrust and potentially misuse power. "Openness is essential because it

KING COUNTY DEPT OF PUBLIC DEFENSE
NORTHWEST DEFENDERS DIVISION
710 SECOND AVENUE, SUITE 250
SEATTLE, WA 98104

1 "enhances both the basic fairness of the … trial and the appearance of fairness so essential to
2 public confidence in the system." Seattle Times Co. v. U.S. Dist. Court for W. Dist. of
3 Washington, 845 F.2d 1513, 1522 (9th Cir. 1988). Openness is presumption, but not absolute.
4 Drieling, 151 Wn.2d at 909. The public's right to of access to court proceedings may be limited
5 to protect other significant and fundamental rights, most notably a criminal defendant's right to a
6 fair trial. Federated Publ'ns, Inc. v. Kurtz, 94 Wash.2d 51, 65 (1980). Generally, the proponent of
7 restricting open access bears the burden of persuading the court that access must be restricted to
8 prevent a threat to an important interest. Seattle Times Co., v. Ishikawa, 97 Wash.2d 30, 37
9 (1982) (while the burden is generally on the proponent, an exception exists if the limitations on
10 access are requested to protect a criminal defendant's right to a fair trial, in which case the
11 objectors carry the burden of suggestion effective alternatives).

12 Washington State's constitutional guarantee of open courts applies to inquest
13 proceedings. Although inquests are quasi-judicial, administrative, fact-finding inquiries, they
14 nonetheless are governed by the constitutional requirement of open courts. Inquests bear many
15 similarities to both criminal and civil trial: a six-person jury is required; each party is represented
16 by legal counsel, and counsel is from the King County Department of Public Defense is
17 appointed to represent the decedent's family if the family is unable to retain its private
18 representation; the rules of evidence apply; the lawyers conduct voir dire, question witnesses,
19 and make summation argument; the inquest is recorded and open to the public. See Executive
20 Order PHL-7-1-2-EO (hereinafter "E.O."); see also RCW 36.24. The public has an
21 overwhelming interest in open inquest procedures as there are few things more critical to
22 public's interest and interrogation as the police-involved death of a community member. If an
23 inquest were to be cloaked in secrecy, the entire purpose of an inquest, the "fair, full, and
24

KING COUNTY DEPT OF PUBLIC DEFENSE
NORTHWEST DEFENDERS DIVISION
710 SECOND AVENUE, SUITE 250
SEATTLE, WA 98104

transparent review" of a death of a person involving law enforcement" would be circumvented. E.O. 2.2. Indeed, public trust in the inquest procedure of the upmost importance. Because inquests fall under the constitutional guarantee of open courts, the City Attorney's Office, or any other party requesting a protective order in this case, bears the burden of persuading the inquest Administrator that that access must be restricted to prevent a threat to an important interest.

b. The proposed Protective Order is contrary to the principal purpose of an inquest, which is to "ensure a full, fair, and transparent review" of the death of an individual by a member of a law enforcement agency in King County.

As set forth in the Executive Order "Conducting Inquests in King County", the purpose of an inquest is "to insure a full, fair, and transparent review of any [death of an individual involving a member of any law enforcement agency within King County while in the performance of the member's duties], and to issue findings of fact regarding the facts and circumstances surrounding the death." E.O. 2.2. Related, E.O. 2.3 explains that "the purpose of the inquest is *not* to determine whether the law enforcement member acted in good faith or should be disciplined or otherwise held accountable, or to otherwise find fault, or to determine if the use of force was justified, or to determined civil or criminal liability."

Signed into law in 2018, the updated inquest procedures reflect the King County's commitment to full, fair, and transparent inquiries into police-involved deaths of members of our community. When signing the new procedures into law, King County Executive Constantine remarked: "I believe the new Executive Order will provide families, law enforcement officers, and community members with greater transparency and accountability. I believe it will give the public more confidence in the inquest process, and it will give law enforcement and policy-makers greater ability to reflect on how training and policies come into play in often difficult

KING COUNTY DEPT OF PUBLIC DEFENSE
NORTHWEST DEFENDERS DIVISION
710 SECOND AVENUE, SUITE 250
SEATTLE, WA 98104

situations, and how they may be improved."[1] The overhaul of the prior inquest procedures came after affected communities advocated for change, voicing concern that the prior process was heavily skewed in favor of the police. The new procedures are intended to create a more just, balanced procedure.[2]

The City Attorney's proposed Protective Order frustrates all of the key policy considerations of the updated King County inquest procedures. The proposed Protective Order requires: (1) an order protecting dissemination of all discovery provided in this inquest, which is largely duplicative of the discovery rules set forth in the Executive Order, and (2) limitations on what "confidential material" can be discussed or referenced in court filings by parties to this inquest; filing redacted or sealed documents. "Confidential material" is defined broadly in the proposed Protective OrderThe City Attorney's proposed Protective Order fails to defines "confidential material" broadly and without reference to specific materials. See Attachment A, City Attorney's Proposed Protective Order

The City's Attorney's proposal is simply too broad and undercuts the County's policy of open, transparent review of officer-involved deaths. While some of the specific information about involved parties – for example, social security numbers and home addresses – arguably should be subject to redaction, the City Attorney's proposal goes significantly further than this. Indeed, if order by the Administrator, the public would not even have access to many court filings referencing facts of this case. In the context of the critical policy of King County's

[1] Executive Constantine announces new process for police inquests, October 3, 2018, available at http://www.kingcounty.gov/elected/executive/constantine/news/release/2018/October/03-inquest-reform.aspx.
[2] King County reinstates police deadly-force inquests following overhaul, The Seattle Times, May 30, 2019, available at https://www.seattletimes.com/seattle-news/king-county-reinstates-police-deadly-force-inquests-following-overhaul.

KING COUNTY DEPT OF PUBLIC DEFENSE
NORTHWEST DEFENDERS DIVISION
710 SECOND AVENUE, SUITE 250
SEATTLE, WA 98104

updated inquest procedures, the City Attorney's proposed Protective Order should not be impose, at least in its current incarnation.

c. The procedures for conducting inquests already require significant limitations on discovery, prohibiting any dissemination outside of the inquest proceedings.

The Executive Order sets for strict rules regarding discovery. E.O. 4.0. Specifically, the rules require that "[d]iscovery materials are to be used by the attorneys solely for the inquest proceeding." E.O. 4.1. This provision in-and-of-itself requires strict restrictions on discovery received by parties during the pendency of this inquest.[3] The Executive Order further outlines the procedures for confidential materials that a party seeks to use during the inquest procedure. E.O. 4.3. Finally, the Executive Order specifies that the "disciplinary history of the law enforcement member(s) involved may not be introduced into evidence unless the administrator first determines that it is directly related to the use of force." E.O. 4.6. Because the Executive Order already provides for restrictive discovery rules, the proposal by the City Attorney regarding dissemination of discovery is duplicative and unnecessary. Moreover, while, under the inquest discovery rules, a party may seek a protection order for specific confidential information, the City's proposed Protective Order is overly broad and the City has failed to show what, if any, material is so extraordinarily confidential that it merits extra protection. The proponent of restriction bears the burden in this context, and the City has failed to meet its burden.

[3] Notably, this provision is more restrictive than the discovery rules in criminal cases. As a result, DPD has taken great measures to ensure that other attorneys and staff at the undersigned attorneys division cannot access discovery in this case. In addition to the assigned attorneys, the only people with access to materials in this case are the assigned paralegals, the assigned legal administrative assistances, the attorneys supervising attorney, and the division's managing attorney. This is a significant departure from DPD's usual practice, in which any attorney or staff member within a division can access discovery of any of the division's cases.

KING COUNTY DEPT OF PUBLIC DEFENSE
NORTHWEST DEFENDERS DIVISION
710 SECOND AVENUE, SUITE 250
SEATTLE, WA 98104

d. The inquest Administrator should apply the <u>Seattle Times v. Ishikawa</u> analysis to any request to file redacted or sealed documents that are relied upon during this inquest.

Although the City Attorney's Proposal is unacceptably overbroad, the inquest Administrator may consider, at a future date, motions to redact or seal parts of the record that applies to extremely sensitive information. While the presumption is for open courts, "[t]he public trial right is not absolute but may be overcome to serve an overriding interest based on findings that closure is essential and narrowly tailored to preserve higher values." <u>State v. Lormer</u>, 172 Wn.2d 85, 91 (2014); <u>Dreiling</u>, 151 Wn.2d at 909 ("Openness is presumptive but is not absolute. The public's right of access may be limited to protect other significant and fundamental rights, such as a defendant's right to a fair trial.")

The presumption of openness may be overcome, and a court record sealed or redacted, if the court finds that the factors set forth in <u>Seattle Times v. Ishikawa</u> favor sealing. <u>Ishikawa</u>, 92 Wn.2d 30, 37-39 (2017). In order for the presumption of openness to be overcome in favor of sealing or redacting, the <u>Ishikawa</u> factors require that:

(1) "The proponent of closure ... must make some showing [of compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right' ";
(2) "Anyone present when the closure motion is made must be given an opportunity to object to the closure"
(3) "The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests' ";
(4) "The court must weigh the competing interests of the proponent of closure and the public" and
(5) "The order must be no broader in its application or duration than necessary to serve its purpose."

<u>State v. Chen</u>, 178 Wn.2d 350, 355, 309 P.3d 410, 413 (2013), citing <u>Ishikawa</u>, 97 Wn.2d 30 (internal quotation marks omitted).

KING COUNTY DEPT OF PUBLIC DEFENSE
NORTHWEST DEFENDERS DIVISION
710 SECOND AVENUE, SUITE 250
SEATTLE, WA 98104

In tandem with Ishikawa, GR 15 requires that, in order to grant a motion to seal and redact records, the court must find that the sealing and redacting "is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record." GR 15(c). GR 15 permits sealing part of a court file "if the sealing or redaction is permitted by statute" or "another identified compelling circumstances exists that requires the sealing or redaction." GR 15(c)(2)(A); GR 15(c)(2)(F). In the future, when considering narrow, fact-specific requests to seal or redact, the inquest Administrator should apply the Ishakawa factors when making a determination if the presumption of openness is overcome.

DATED this 1st day of July, 2019

/s Adrien Leavitt & /s Sadé Smith

Adrien Leavitt, WSBA #44451
Sadé Smith, WSBA #44867
Attorneys for Mother of Damarius Butts

APPENDIX A

1
2
3
4
5
6
7

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

8
9

IN RE INQUEST INTO THE DEATH OF DAMARIUS D. BUTTS,	No. 516IQ2644 STIPULATED [PROPOSED] PROTECTIVE ORDER RE: DISCOVERY MATERIALS [**CLERK'S ACTION REQUIRED**]

10
11
12
13

14 1. DEFINITIONS

15 a. "Court" shall be defined as the Administrator in this case.

16 b. "Party" shall be defined as any person(s) who has or have appeared and participates in the

17 above-numbered inquest.

18 c. "Case" shall be defined as the above-referenced Inquest.

19 2. <u>PURPOSES AND LIMITATIONS</u>

20 Discovery in this action is likely to involve production of confidential, proprietary, or private

21 information for which special protection may be warranted, which the parties agree should be subject to a

22 protective order. The scope of this Protective Order does not mean, however, that the records produced in

23 discovery under this Order will be automatically sealed by the Court. This Order details procedures for the

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

parties to meet and confer on documents designated confidential. Prior to public disclosure or public filing of documents deemed "confidential," a party may request the removal of a confidentiality designation or redact the contents of the document that are designated "confidential," thus removing the confidentiality of the document itself. Otherwise, a party must adhere to the requirements of General Rule 15, Local General Rule 15, and Local Civil Rule 26 by requesting that the Court "seal" any documents deemed "confidential" under this Order. Under General Rule 15(c)(1), "the [C]ourt or any party may request a hearing to seal or redact the court records." After a hearing, the Court may order files to be sealed or redacted. General Rule 15(c)(2). "Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records." Instead, the Court must weight a party's privacy or safety concerns against the public interest. General Rule 15(c)(2). "A court record shall not be sealed under this section when redaction will adequately resolve" issues of confidentiality. General Rule 15(c)(3). This Order does not otherwise restrict the public's ability to access publicly available documents through normal means under R.C.W. 42.56 *et seq.* For these reasons the parties jointly request the court to enter the following Stipulated Protective Order. The parties acknowledge that this agreement is consistent with LCR 26(c) and CR 45(c)(3)(A)(iii), in that it: a) does not confer blanket protection on all disclosures or responses to discovery, b) the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles, and c) it does not presumptively entitle parties to file confidential information under seal.

2. "CONFIDENTIAL" MATERIAL

"Confidential" material shall include the following documents and tangible things produced or otherwise exchanged: (1) medical, psychological, and financial records; (2) non-public tactical policies, procedures, and training protocols; (3) records that could implicate the

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

privacy rights of the parties or third parties, including, but not limited to, personal identifying information ("PII") such as date(s) of birth, social security number(s), personal home address(es), phone number(s), and e-mail address(es), driver's license or state identification number(s), personal financial information, passport information, immigration status, criminal history and/or criminal record number(s), and other unspecified PII; and (4) ____
____
____

3. SCOPE

This Stipulated Protective Order applies to all discovery materials. The protections conferred by this agreement cover not only confidential material but also (1) any information copied or extracted from confidential material; (2) all copies, excerpts, summaries, or compilations of confidential material; and (3) any testimony, conversations, or presentations by parties or their counsel that might reveal confidential material. Except that the protections conferred by this agreement do not apply to information that is in the public domain or becomes part of the public domain through motion and trial proceedings.

4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

(a) Basic Principles. A receiving party may use confidential material that is disclosed or produced by another party or by a non-party in connection with this case only for the purpose of the inquest itself. The Records shall not be used for any purpose other than in support of the fact-finding purpose of the above-entitled case. Counsel and their support staff and personnel shall not disclose or permit the disclosure of any Confidential Information (as defined in Paragraph 2) to any other person or entity except for the Court and its personnel, to the extent necessary. Should counsel provide copies of the Records to

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

the other persons, counsel must first redact the Confidential Information contained therein.

(b) Disclosure. To the extent that counsel must provide the unredacted records to an expert, consultant, investigator, party, or another professional tasked with assisting the inquest, counsel shall provide that individual or entity with a copy of this Protective Order and require execution of the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound. The original executed Acknowledgment of Understanding and Agreement to Be Bound shall be retained in counsel's file.

(c) Public Release or Filing Confidential Material. Before including confidential material or discussing or referencing such material in court filings, the filing party shall confer with the parties to determine whether the confidential designation can be removed, whether the document can be redacted, or whether a motion to seal or stipulation and proposed order is warranted. All documents containing confidential matter that are redacted before public release or filing, shall be redacted in compliance with CR 10(f) and GR 31(e).

5. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as "CONFIDENTIAL," that party must:

(a) promptly notify the designating party in writing and include a copy of the subpoena or court order;

(b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this agreement. Such notification shall include a copy of this agreement; and

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

(c) cooperate with respect to all reasonable procedures sought to be pursued by the designating party whose confidential material may be affected.

6. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a party learns that, by inadvertence or otherwise, it has disclosed confidential material to any person or in any circumstance not authorized under this agreement, the receiving party must immediately (a) notify in writing the designating party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the protected material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this agreement, and (d) request that such person or persons execute the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

7. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

When a producing party gives notice to receiving parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the receiving parties are those set forth in CR 26(b)(6). This provision is not intended to modify whatever procedure may be established in an e-discovery order or agreement that provides for production without prior privilege review. Parties shall confer on an appropriate non-waiver order under ER 502.

8. FINAL DISPOSITION AND PENALTIES

1) When a final disposition in the above-entitled case has been reached, other than the evidence retained by the investigating law enforcement agency, the Records shall be returned to SPD or destroyed within 30 days following final disposition, unless otherwise agreed to by the parties and approved by the Court.

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

2) Any violation of any term or condition of this order may constitute contempt and may subject the party to monetary damages or other sanctions as deemed appropriate by the Court.

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD this __ day of June, 2019

DATED this ___ day of June, 2019.

Attorney for Damarius Butts Family: By: Adrien Leavitt, WSBA # 44451 King County Department of Public Defense 710 2nd Ave., Ste. 250 Seattle WA, 98104 E-Mail: Adrian.Leavitt@kingcounty.gov	***Attorney for City of Seattle:*** PETER S. HOLMES Seattle City Attorney By: */s/ Ghazal Sharifi* Ghazal Sharifi, WSBA# 47750 Erika J. Evans, WSBA# 51159 Assistant City Attorneys 701 5th Ave., Ste. 2050 Seattle, WA, 98104 E-Mail: Ghazal.Sharifi@seattle.gov E-Mail: Erika.Evans@seattle.gov
Attorney for Involved Officers By: Ted Buck, WSBA #22029 Evan Bariault, WSBA #42867 Frey Buck P.S. 1200 Fifth Ave., Suite 1900 Seattle, WA E-Mail: TBuck@freybuck.com E-Mail: EBariault@freybuck.com	

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED this ______ day of ______________________, 2019

____

HONORABLE MICHAEL SPEARMAN
King County Administrator

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the attached **NOTICE OF APPEARANCE** was caused to be served on counsel of record in the manner indicated below:

Matthew Anderson Matt.Anderson@kingcounty.gov	☑ By E-mail
Adrien Leavitt Adrian.Leavitt@kingcounty.gov	☑ By E-mail
Ted Buck TBuck@freybuck.com	☑ By E-mail
Evan Bariualt EBariault@freybuck.com	☑ By E-mail
Dee Sylve Dee.Sylve@kingcounty.gov	☑ By E-mail

DATED this 29th day of May, 2019.

/s Kelly Nakata
Kelly Nakata, Paralegal
E-mail: Kelly.Nakata@seattle.gov

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____________________________ [print or type full name], of _________________________ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the King County Court Administrator on [____________] in the Inquest into the death of Damarius Butts, Case No. 516IQ2644, I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the King County Court Administrator for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

Date: _________________________________

City and State where sworn and signed: _________________________________

Printed name: ______________________________

Signature: __________________________________

Peter S. Holmes
Seattle City Attorney
701 5th Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200