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

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)  
IN RE INQUEST INTO THE DEATH OF) No. 517IQ8013  
DAMARIUS D. BUTTS )  
)  
) SEATTLE POLICE DEPARTMENT'S  
) RESPONSE IN SUPPORT ENTRY OF  
) PROTECTIVE ORDER  
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The Seattle City Attorney's Office, on behalf of the Seattle Police Department ("SPD"), hereby submits this instant response brief in support of its request for entry of its proposed Protective Order.

**STATEMENT OF ISSUE**

- (1) Whether a First Amendment analysis applies in the discovery phase of the present inquest proceeding?
- (2) Whether confidential matter is clearly defined in SPD's proposed Protective Order?
- (3) Whether SPD's proposed Protective Order is duplicative of the King County Executive Order?

1 (4) Whether the Family’s Counsel has demonstrated that the confidential matter defined in the  
2 Proposed Protective Order is necessary for public dissemination?

3 (5) Whether the standard in *Seattle Times v. Ishikawa* should be applied to SPD in the context of  
4 this inquest?

5 **BRIEF ANSWER**

6 (1) No.

7 (2) Yes.

8 (3) No.

9 (4) No.

10 (5) No.

11 **EVIDENCE RELIED UPON**

12 (1) Declaration of Erika Evans and corresponding exhibits;

13 (2) The record contained herein.

14 **ARGUMENT**

15 There is nothing in SPD’s proposed Protective Order that seeks to restrict public access to  
16 open hearings – or even all the documents exchanged in discovery. Rather, the proposed Protective  
17 Order seeks to safeguard traditionally non-public “confidential matter” as defined in the Protective  
18 Order from public disclosure and dissemination. This confidential matter consists largely of personal  
19 identifying information (“PII”) and non-public tactical information. As discussed at length in SPD’s  
20 initial brief, this proposed Protective Order is modeled after ones consistently entered in civil and  
21 criminal litigation matters.

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1           **1. Discovery Under the Standards of CR 26(c) and Protective Orders Do Not Require a**  
2           **First Amendment Analysis.**

3           The Family’s counsel erroneously relies on a First Amendment right to public access for the  
4 inquest proceedings throughout their briefing. Referencing a case cited, but not quoted by Family’s  
5 counsel:

6           “District courts analyzing protective orders entered into during civil discovery are  
7 prohibited in the Third Circuit from engaging in First Amendment analysis, but  
8 instead examine whether protective orders meet the good cause requirements of  
9 Federal Rule of Civil Procedure 26(c).

10          *Republic of Philippines v. Westinghouse Elec. Corp.*, 139 F.R.D. 50, 57 (D.N.J. 1991). The Supreme  
11 Court in *Rhinehart v. Seattle Times Co.*, states, “discovery under the standards of CR 26(c) and the  
12 protective orders of the court in this case do not require a First Amendment analysis.” *Rhinehart v.*  
13 *Seattle Times Co.*, 98 Wn.2d 226, 258, 654 P.2d 673, 691 (1982), aff’d, 467 U.S. 20, 104 S. Ct. 2199,  
14 81 L. Ed. 2d 17 (1984). Justice Dolliver, in *Rhinehart*, concurred that protective orders are “not an  
15 assault on the Bill of Rights” and

16           “there is no “waiver” of First Amendment rights...it is simply that when a party uses  
17 the court’s process in a manner which may be unfair to the other party and is unrelated  
18 to the litigation purpose of discovery, the court has the power and responsibility to  
19 take whatever action is necessary to protect its process from abuse, and a protective  
20 order requiring a litigant to use the products of discovery in a manner consistent with  
21 the purposes of discovery is a permissible “prior restraint” if it meets the standards set  
22 forth in Rule 26(c).

23          *Id.* at 258-59.

          Consistent with Rule 26(c), the Washington State Superior Court Civil Rule 26(c) mirrors  
its federal counterpart. *Rhinehart* states,

          “the interest of the judiciary in the integrity of its discovery processes is sufficient to  
meet the “heavy burden” of justification. The need to preserve that integrity is  
adequate to sustain a rule like CR 26(c) which authorizes a trial court to protect the  
confidentiality of information given for purposes of litigation.”

1 *Rhinehart.*, 98 Wn.2d at 256. The First Amendment right to publicly access proceedings does not  
2 apply to confidential material safeguarded by a protective order. Thus, the Family’s counsel heavy  
3 reliance on this position is fundamentally flawed.

4 **2. Confidential Material is Clearly Defined in the Proposed Protective Order.**

5 Streamlining to the key issues filed by the Family’s counsel in their opposition motion, it is  
6 unclear what the Family’s counsel is objecting to in the proposed protective order. Counsel in their  
7 brief state, “confidential material is defined broadly in the proposed Protective OrderThe [sic]” yet,  
8 states, “The City Attorney’s proposed Protective Order fails to defines confidential material  
9 broadly and without reference to specific materials.” (See Evans Dec., Ex. A, Family of the  
10 Deceased Motion Opposing Protective Order RE: Discovery Materials 5:10-13). This statement  
11 is at odds with how the proposed Protective Order defines confidential material, specifically,  
12 SPD’s proposed protective order explicitly details and defines confidential matter - it seeks to  
13 protect from dissemination:

14 Medical, psychological, financial records, non-public tactical  
15 policies, non-public procedures, and non-public training protocols,  
16 records that could implicate the privacy rights of the parties or third  
17 parties, personal identifying information, dates of birth, social  
18 security numbers, personal home addresses, phone numbers, email  
19 addresses, driver’s license of state identification numbers, personal  
20 financial information, passport information, immigration status,  
21 criminal history, criminal record numbers, and other unspecified  
22 personal identifying information.

23 (See Evans Dec., B, Proposed Protective Order p. 2-3 20-23, 1-5). The terms of the proposed  
protective order clearly highlight what it seeks to protect against public dissemination. In fact, the  
Family counsel indicated via e-mail, “we certainly do not object to any kind of agreement/order not  
to file personal information such as home addresses, social security numbers, etc. We would redact  
such information if we needed to file any documents containing it.” (Evans Dec., Ex. C, July 8,

1 2019 e-mail from Adrien Leavitt). This “agreement/order” is exactly consistent with the terms  
2 detailed in SPD’s proposed protective order.

3 Attorneys for the Family agree that “social security numbers and home addresses” should  
4 be redacted yet fail to address why the remaining materials proffered in the protective order by  
5 SPD should not be. (See Evans Dec., Ex. A, Family of the Deceased Motion Opposing Protective  
6 Order RE: Discovery Materials p. 5:15-17). It is unclear under what basis that officers and third  
7 parties’ medical, psychological, financial records, non-public tactical policies, non-public  
8 procedures, non-public training protocols, and PII is material and relevant for *public dissemination*  
9 challenging the Family counsel’s representation of Mr. Butts family in the present inquest  
10 proceeding. Notably so, the Family’s counsel fails to offer argument to the contrary. Language  
11 from SPD’s proposed protective order states:

12 “This Protective Order does not mean, however, that the records, produced in  
13 discovery under this Order will be automatically sealed by the Court. This Order  
14 details procedures for the parties to meet and confer on documents designated  
15 confidential. Prior to public disclosure or public filing of documents deemed  
16 “confidential,” a party may request the removal of a confidentiality designation or  
17 redact the contents of the document that are designated “confidential,” thus removing  
18 the confidentiality of the document itself.”

19 (See Evans Dec., Ex. B Proposed Protective Order p. 1:22-23; p. 2:1-4). As detailed at length in  
20 SPD’s primary brief, this language is consistent with the reservations of the Family’s counsel and  
21 consistent with the spirit of CrR 4.7, CR 26, GR 31, and Washington jurisprudence.

### 22 **3. SPD’s Proposed Protective Order is Not Duplicative of the Executive Order.**

23 The Family’s counsel argues that the Executive Order outlines procedures for confidential  
materials and that SPD’s proposed Protective Order is “duplicative and unnecessary.” (See Evans  
Dec., Ex. A Family of the Deceased Motion p. 6:12-14). The Executive Order is silent on the

1 definition of confidential matter and the dissemination of the same. The Family’s counsel cites to  
2 Section 4.1 of the Executive Order for support – but the statement that “[d]iscovery materials are to  
3 be used by the attorneys solely for the inquest proceeding” has nothing to do with the dissemination  
4 and protection of confidential matter including PII. Within the same paragraph for Family’s Counsel  
5 they state, “the City has failed to show what, if any, material is so extraordinarily confidential that it  
6 merits extra protection.” (See Evans Dec., Ex. A Family of the Deceased Motion p. 6:16-17). The  
7 proposed protective order clearly outlines areas where SPD seeks protection from public  
8 dissemination. Further, it is improper for counsel to shift the burden on SPD to establish that certain  
9 document contains confidential material. As mentioned in SPD’s initial brief, the King County  
10 Executive Order states:

11 “in the event that confidential materials in the possession of any person or agency  
12 are sought for use in the inquest, the administration, upon a prima facie showing of  
13 necessity, relevancy, and lack of an alternative source for the materials, shall  
14 examine the materials in camera. These materials may include, and the  
15 administrator shall have the discretion to consider the admissibility and use of,  
16 information that may be relevant to the incident. The legal representative of the  
17 person or agency in possession of the materials shall have the right to participate in  
18 the review of these materials.”

19 King County Executive Order Discovery and Admissibility of Evidence rule 4.3.

20 Pursuant to the King County Executive Order and rules of evidence, SPD has a right to  
21 seek court protection for entry of the proposed protective order and the Family’s counsel has  
22 concurrent authority to challenge the confidentiality designations as outlined in the proposed  
23 Protective Order.

**4. Family’s Counsel Fails to Show How Confidential Material Defined in the Proposed Protective Order is Relevant and Material to their Representation.**

As previously mentioned, consistent with 4.3, there is room for the attorneys for the Family to challenge confidential material they deem relevant and necessary for public dissemination during

1 the course of the inquest. Upon a showing of necessity, relevancy, and a lack of an alternative source,  
2 the administrator may look at the confidential records in camera. King County Executive Order  
3 Discovery and Admissibility of Evidence rule 4.3 parallels the language of SPD's proposed Protective  
4 Order.

5 The Family's counsel fails to make any factual showing as to why the confidential matter  
6 they seek to have open to the public would be relevant and material to require its public disclosure –  
7 or why such confidential matter being redacted or falling under the protective order is an impediment  
8 to the representation of Mr. Butt's family in the inquest proceeding. Speculation alone without any  
9 further factual showing is simply insufficient. *See Blackwell*, 120 Wn.2d at 830. The Family's  
10 counsel fails to demonstrate a showing of materiality and relevance for public disclosure of  
11 confidential matter.

11 **5. *Seattle Times v. Ishikawa* does not apply.**

12 The Family's counsel incorrectly applies a standard used when a defendant's right to a fair  
13 trial is at risk. Throughout their brief, the Family's counsel references the importance of open access  
14 to the court. SPD agrees. Here, *Seattle Times v. Ishikawa* does not apply to the present inquest  
15 proceeding. In *Ishikawa*, the Washington State Supreme Court contemplated the fine balance of a  
16 defendant's constitutional rights to a fair trial and the importance openness of court proceedings to  
17 the press and public. In *Ishikawa*, the superior court judge closed a murder trial to the public and  
18 sealed records. Unlike in our case, SPD is not requesting the inquest proceeding be closed to the  
19 public. Further, SPD is not making a blanket request to seal any records. **Merely, SPD has proposed**  
20 **a narrowly defined Protective Order to ensure that confidential matter remains protected from public**  
21 **disclosure and dissemination.**

22 SPD's proposed protective order is very reasonable and allows the inquest administrator to  
23 have the final say in whether records should be sealed or redacted, all the while allowing all parties

1 to be heard when records are in dispute. SPD’s proposed protective order contemplates this explicitly:  
2 “agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of  
3 court records. Instead, the Court must weight a party’s privacy or safety concerns against the public  
4 interest.” (See Evans Dec., Ex. B Proposed Protective Order p. 2:8-10).

5 When a party seeks a protective order, courts are instructed to balance the respective  
6 interests of the parties. *See T.S. v. Boy Scouts of Am.*, 157 Wn. 2d 416, 430-31, 138 P.3d 1053  
7 (2006) (discussing balancing inquiry is inherent in CR 26(c)). SPD objects to having irrelevant  
8 confidential material of officers and third parties openly disseminated to the public.

9  
10 **CONCLUSION**

11 SPD respectfully requests that the Administrator enter the proposed Protective Order,  
12 attached as Evans Dec., Ex. A.

13 DATED this 9<sup>th</sup> day of July, 2018.

14 PETER S. HOLMES  
15 Seattle City Attorney

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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the attached **SEATTLE POLICE DEPARTMENT’S RESPONSE IN SUPPORT ENTRY OF PROTECTIVE ORDER** was caused to be served on counsel of record in the manner indicated below:

Matthew Anderson <a href="mailto:Matt.Anderson@kingcounty.gov">Matt.Anderson@kingcounty.gov</a>	<input checked="" type="checkbox"/> By E-mail
Adrien Leavitt <a href="mailto:Adrian.Leavitt@kingcounty.gov">Adrian.Leavitt@kingcounty.gov</a>	<input checked="" type="checkbox"/> By E-mail
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DATED this 9<sup>th</sup> day of July, 2019.

*/s Ghazal Sharifi*  
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