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9 **IN THE STATE OF WASHINGTON**  
10 **KING COUNTY DEPARTMENT OF EXECUTIVE SERVICES**

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13 *IN RE: THE INQUEST INTO THE*  
14 *DEATH OF ISALIAH OBET*

NO. 417I17199

Family Motion for Administrator to  
Compel/Subpoena Evaluations

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18 **I. INTRODUCTION**

19 The Administrator requested briefing regarding the family's position that the  
20 psychological evaluations of officer Nelson are discoverable. The family asserts that the  
21 administrator has the ability to compel (1) the evaluation required to be hired and certified as a  
22 Peace officer, (2) the fitness for duty evaluation after the death of Brian Scaman and (3) the  
23 fitness for duty evaluation done after the death of Isaiah Obet.  
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25 **II. APPENDIX**

26 A. Fitness for Duty Evaluation Letter from Bobo Lee Chief of Police  
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### III. ARGUMENT

***A. There are three psychological evaluations pertaining to officer Nelson of which the Family is aware.***

Both the Auburn Police Department Manual and the Washington Revised Code makes it clear that in order for someone to be a certified Peace Officer they must complete a psychological test. *APD Policy Manual*, Recruitment and Selection, 1000.4, page 538; 1008, 1 page 540; RCW 43.101.095(2)(a)(ii). Thus in order for officer Nelson to have become a certified peace officer for the City of Auburn he must have completed an initial psychological evaluation. Then in 2011, officer Nelson was involved in an officer related shooting, killing Brian Scaman. The Auburn Police Department Manual makes clear that in response to a shooting death a Fitness for Duty examination may be required. *Auburn Police Manual*, Fitness for Duty, Section 1014.4, page 597. Officer Nelson was then again involved in a shooting resulting in the death of Isiah Obet. In response, on June 16, 2017, Bob Lee, Chief of Police ordered that officer Nelson be, “sent to the department psychologist for a Critical Incident Debriefing evaluation.” [Appendix A- Letter RE: Fitness for Duty]. This letter further noted that the evaluation was mandatory and was scheduled with Dr. Thomas Petek for Tuesday, June 20<sup>th</sup>, 2017. Thus in total the family is aware of likely at minimum these three psychological evaluations of officer Nelson.

***B. The Administrator has the power to compel these documents as part of discovery regardless of whether these would ultimately be admissible in trial.***

1 Civil Rule 26 provides guidance as to the scope of discovery. This rule indicates that  
2 relevancy is the driving force behind what is deemed discoverable. That any matter, not  
3 privileged, which is relevant to the subject matter may be deemed discoverable. CR 26. Most  
4 importantly this rule holds that it is not a ground for objection that the information sought will be  
5 inadmissible at trial if the information sought appears reasonably calculated to lead to the  
6 discovery of admissible evidence. CR 26. Thus, in order to compel the evaluations they simply  
7 must have some evidentiary value. At the discovery phase, relevance should be construed  
8 broadly.  
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10 Here the evidentiary value is great. The Inquest proceeding is an investigatory exploration  
11 into what has been deemed a suspicious death of a person at the hands of law enforcement. The  
12 spirit of this process is to ensure a “full, fair, and transparent review of any such death, and to  
13 issue findings of facts regarding the facts and circumstances surrounding the death.” PHL-7-1-3-  
14 EO. This includes a review of the cause and manner of death and whether law enforcement  
15 member acted pursuant to policy and training. Information relating to whether officer Nelson is  
16 fit for duty, his mental state prior to and close in time to the event, and whether he prone to  
17 excessive force is directly related to his actions on the day he shot and killed Isaiah Obet.  
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20 The executive order in section 4.3, indicates that should confidential materials in possession  
21 of any person be sought, the administrator, “upon prima facie showing of necessity, relevancy,  
22 and lack of an alternative source for the materials, shall examine the materials in camera.” PHL-  
23 7-1-3-EO. The Family has already received discovery from the parties, but has not received the  
24 psychological evaluations and thus has no alternative source for the materials. Because these  
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1 materials are necessary and relevant and because they have not been disclosed, the administrator  
2 has the power to compel and review them.

3 ***C. The party asserting privilege has the burden to prove it exists.***  
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5 It is not clear from prior briefing and oral argument exactly what the City's position is as to  
6 the psychological evaluations. Likely there is an assertion of privilege, either the psychotherapy  
7 privilege under RCW 18.130.010 or HIPPA privacy protections under RCW 72.02. However, it  
8 is the party asserting the privileges burden to prove such privilege exists.  
9

10 ***D. These psychological evaluations are not protected by psychotherapy privilege as officer***  
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12 ***Nelson had no reasonable expectation of privacy when submitting to the evaluations.***  
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14 Officer Nelson's expectation of privacy is absent in this case and as such these evaluations  
15 may be compelled. The seminal case governing the application of the psychotherapist-patient  
16 privilege is *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct 1923, 135 L.Ed.2d 337 (1996). That case  
17 involved to an officer shooting, where the plaintiffs sought the involved officer' personal therapy  
18 notes, from voluntary sessions with a private provider. The Supreme Court held these notes to be  
19 confidential communications. It recognized the psychotherapy privilege noting that it, "serves  
20 the public interest by facilitating the provision of appropriate treatment for individuals suffering  
21 the effects of a mental or emotional problem." *Id.* at 12. This ruling had to do with "protecting  
22 the mental health of our citizenry," and the fear of chilling the confidences between patient and  
23 provider. *Id.* This privilege is codified in Washington through RCW 18.130.010.  
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1           Whereas raised here is a strong public interest in having Peace Officers who are mentally fit  
2 to perform this job and who were at the time of the shooting. This rationale raised by the family  
3 for compelling the evaluations of Nelson undercuts the policy justifications for the privilege  
4 asserted in *Jaffee*. Yet ultimately, the question of privilege hinges on whether the Officer has a  
5 reasonable expectation of privacy. *Hertog, v. City of Seattle*, 88 Wash.App 41, 943, P.2d 1153  
6 (1997). An objective inquiry must be made considering both the speaker’s subjective  
7 expectations of confidence as well as the “situation and circumstances in which the  
8 communication was made.” *State v. Post*, 118 Wash.2d 596, 612, 826 P.2d 172 (1992)

9  
10           In the context of a fitness examination or hiring psychological evaluation that expectation of  
11 privacy is waived in order to allow those records to be disclosed to a superior and the hiring  
12 department. In *Scott v. Edinburg*, no psychotherapist patient privilege existed because prior to  
13 the evaluation the police officer was informed the evaluation would be reviewed by the police  
14 chief. 101 F.Supp.2d 1017-1020 (N.D.Ill.2000). Additionally in *Kamper v. Gray*, the privilege  
15 was rejected because police officers were aware that the mental health evaluations would be  
16 reported to an employer. 182 F.R.D. 597, 599 (E.D.Mo.1998). Whereas in cases where the  
17 evaluation was not reviewed by superiors the privilege was found. *Caver v. City of Trenton*, 192  
18 F.R.D. 154 162 (D.N.J.200); *Williams v. District of Columbia*, No. CIV A. 96-0200-LFO, 1997  
19 WL 224921 (D.D.C. Apr. 25, 1997).

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21           The evaluations sought in this case are easily distinguished from those in *Jaffee* and hold  
22 minimal expectation of privacy. *Jaffee* had to do with voluntary treatment with outside providers,  
23 whereas the family is seeking the mandatory evaluations of officer Nelson. It is clear through  
24 both the policy manual and the RCW, that one must complete a psychological evaluation in order  
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1 to be hired and certified as a peace officer. Thus, when officer Nelson submitted to the initial  
2 evaluation there was the awareness that third parties would be reviewing those results to  
3 determine his eligibility for employment. This waives any expectation of privacy as to the  
4 psychological evaluation. The APD Policy Manual also indicates pre-employment personnel  
5 files are maintained by the office of the Chief of Police in the Human Resources Department.  
6 *APD Policy Manual*, Personnel Files, Section 1013.3, page 590. Secondly, as to his two Fitness  
7 for Duty examinations, the Auburn Police Department Manual makes it clear these are included  
8 in the personnel files for officers. Section 1013.2 defines the Personnel File and indicates in  
9 section (b), that this includes fitness for duty applications. *APD Policy Manual*, Personnel Files,  
10 Section 1013.2(b), page 589. There is no expectation of privacy when it is clear the fitness exam  
11 results would be reviewed by a superior.  
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14 The evaluations in question here are contemplated in the APD training manual, are clearly to  
15 be disclosed to third parties superiors and HR departments, are not voluntary treatment sought  
16 but mandatory testing, and are included in officer's personnel files. Therefore, in this case the  
17 reasonable expectation of privacy and underlying interest in confidentiality does not exist and the  
18 administrator may compel their production.  
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20 ***E. These evaluations are also not HIPPA protected as they are not for conducted with the***  
21 ***intention of medical treatment.***  
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24 Generally, "a health care provider, an individual who assists a health care provider in the  
25 delivery of health care, or an agent and employee of a health care provider may not disclose  
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1 health care information about a patient to any other person without the patient's written  
2 authorization." RCW 70.02.020. RCW 70.02.010(17) defines health care information as:

3 "Health care information" means any information, whether oral or recorded in  
4 any form or medium, that identifies or can readily be associated with the  
5 identity of a patient and directly relates to the patient's health care...The term  
6 includes any required accounting of disclosures of health care information.  
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9 Moreover, under RCW 70.02.010(15), "Health Care" is defined as:

10 (15) "Health care" means any care, service, or procedure provided by a health care  
11 provider:

12 (a) To diagnose, treat, or maintain a patient's physical or mental condition  
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15 Here it is clear that some sort of documentation or report must have been disclosed from the  
16 department psychologist to superiors, HR department, and then included ultimately included the  
17 personnel files of officer Nelson. It is unclear with the discovery thus far available to the Family  
18 whether that is done through an oral consent or written authorization process. But that posture  
19 would waive any privilege issues regarding HIPPA. As well, the family is not seeking the  
20 evaluations directly from the health care provider, but from what has already been disclosed to  
21 the Auburn Police Department and or the City of Auburn. Moreover the fitness for duty and  
22 initial psychological evaluation do not meet the definition of protected "health care" as they are  
23 not intended for diagnosis, treatment, or maintaining ones physical or mental condition, but  
24 instead to determine eligibility to be certified as a peace officer and to retain one's fitness for  
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1 employment. It is analogous to forensic examination by a physician not being within the  
2 statutory testimony prohibitions of doctor patient privilege, when examination is done not for the  
3 purpose of treatment but for publication of results. *State v. Sullivan*, 60 Wash.2d 214, 244, 373  
4 P.2d 474 (1962); *Strafford v. Northern Pac R. Co.* 95, Wash, 450, 453, 164 P. 71 (1917).

5 Therefore, what is at issue here land outside the scope of what is protected under RCW  
6 72.02. Alternatively outside the presumed authorization of the officer, RCW 72.02.200 indicates  
7 disclosures that can be made without a patient's authorization. This includes a need-to-know  
8 basis, under RCW 70.02.050, to any person if the health care provider, in good faith, believes the  
9 disclosure necessary to prevent or lessen threat to the public. This is in essence the underlying  
10 reason that Officer's undergo psychological testing.

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13 This statute also indicates that all local agencies obtaining patient health care information  
14 pursuant to RCW 72.02.050, are to adopt rules establishing, "their record acquisition, retention,  
15 destruction, and security policies that are consistent with this chapter." This would be the Auburn  
16 Police Department Policy Manual. The APD Policy Manual clearly references the mandatory  
17 nature of psychological evaluations and the inclusion of those in personnel files, which are  
18 generally deemed discoverable. *APD Policy Manual*, Personnel Files, 1013.2, page 589; 1013.4  
19 page 590.

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21 *F. These evaluations are highly probative and relevant.*

22 The family has already discovered two completely inconsistent statements made by Officer  
23 Nelson. In the first statement, made within minutes of the killing of Mr. Obet, he admits to  
24 sending his dog to attack Mr. Obet, then says he shot him in the shoulder, then admits that he  
25 shot him while Mr. Obet was on his way to the ground. This first account is most consistent with  
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1 eye-witness accounts. In Officer Nelson's second statement he states that he first shoots Mr.  
2 Obet in the shoulder, then shoots him in the head while he is on the ground, then his dog attacks.  
3 Moreover, he describes an odd exchange with the woman in the car and Mr. Obet "bicycle  
4 kicking" and on his way back up from being on the ground to attack him. The second statements  
5 occurs after the officer has had an opportunity to review the radio transmissions and potentially  
6 the dash cam. These inconsistencies require further examination into any other statements Mr.  
7 Nelson made. At the very least, Officer Nelson is an eye-witness to the killing of Mr. Obet and  
8 any and all statements he made surrounding his death are highly probative to determining the  
9 facts in this case. In accepting his role as a law enforcement officer he was aware that these  
10 evaluations were not private. Moreover, these statements tend to provide information about the  
11 credibility of Officer Nelson as an eye-witness to the tragic death of Isaiah Obet.  
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14 Ultimately, when reviewing these statements the credibility of the officer matters when  
15 judging their veracity and which statement more or less likely true. Clearly, a psychological  
16 evaluation judging Officer Nelson's fitness before and after the killing would have a significant  
17 potential to shed light on what happened.  
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19 Finally, this information could be ordered by the administrator, reviewed in camera for a  
20 determination of relevancy.  
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#### 22 **IV. CONCLUSION**

23 It is the family's position that the hiring psychological evaluation and subsequent fitness for  
24 duty evaluations of Officer Nelson may be compelled by the Administrator. These are relevant,  
25 necessary, and cannot be obtained through alternate means.  
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1 Officer Nelson had no reasonable expectation of privacy during these evaluations as they  
2 were to be reviewed by third parties, were not for treatment purposes, were mandatorily  
3 assigned, were administered by a department employee, and are required for the certification and  
4 retention as a Peace Officer. Public interest weighs in favor of reviewing an officer's fitness to  
5 perform the job and the Inquest process itself represents the potential grave outcomes of officer  
6 decision making.  
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10 DONE this 13 day of December, 2019.  
11

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**DECLARATION OF SERVICE**

Declarant certifies that I am over the age of eighteen (18), a citizen of the United States, not a party to this action, and competent to be a witness; and that I emailed the foregoing document as indicated:

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I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Executed on December 13, 2019 in Seattle, Washington.

/s/ Amy K. Parker

Amy K. Parker, Attorney for the Family of Mr. Obet

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