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The Honorable Benjamin H. Settle

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

NORTHWEST SCHOOL OF SAFETY, a Washington sole proprietorship, PUGET SOUND SECURITY, INC. , a Washington corporation, PACIFIC NORTHWEST ASSOCIATION OF INVESTIGATORS, INC. , a Washington corporation, FIREARMS ACADEMY OF SEATTLE, INC. , a Washington corporation, DARRYL LEE, XEE DEL REAL, JOE WALDRON, GENE HOFFMAN, ANDREW GOTTLIEB, ALAN GOTTLIEB, GOTTLIEB FAMILY REVOCABLE LIVING TRUST, A Washington trust, and SECOND AMENDMENT FOUNDATION, a non-profit organization,

Plaintiffs,

v.

BOB FERGUSON, Attorney General of Washington (in his official capacity), WASHINGTON ATTORNEY GENERAL'S OFFICE, and JOHN R. BATISTE, Chief of the Washington State Patrol (in his official capacity), and DOES I-V,

Defendants,

and

CHERYL STUMBO, WASHINGTON ALLIANCE FOR GUN RESPONSIBILITY AND EVERYTOWN FOR GUN SAFETY ACTION FUND FOR I-594,

Intervenor-Defendants

NO. 3:14-cv-6026 BHS

AGREEMENT REGARDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION AND [PROPOSED] ORDER

1 The parties hereby stipulate to the following provisions regarding the discovery of
2 electronically stored information (“ESI”) and disclosure of privileged information in this
3 matter:

4 **I. PROVISIONS RELATING TO ESI**

5 **A. General Principles**

6 1. An attorney’s zealous representation of a client is not compromised by conducting
7 discovery in a cooperative manner. The failure of counsel or the parties to litigation to
8 cooperate in facilitating and reasonably limiting discovery requests and responses raises
9 litigation costs and contributes to the risk of sanctions.

10 2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) must be
11 applied in each case when formulating a discovery plan. To further the application of the
12 proportionality standard in discovery, requests for production of ESI and related responses
13 should be reasonably targeted, clear, and as specific as possible.

14 **B. Preservation of ESI**

15 The parties acknowledge that they have a common law obligation to take reasonable
16 and proportional steps to preserve discoverable information in the party’s possession, custody
17 or control. With respect to preservation of ESI, the parties agree as follows:

18 1. Absent a showing of good cause by the requesting party, the parties shall not be
19 required to modify the procedures used by them in the ordinary course of business to back-up
20 and archive data; provided, however, that the parties shall preserve all discoverable ESI in
21 their possession, custody or control.

22 2. All parties shall supplement their disclosures in accordance with Rule 26(e) with
23 discoverable ESI responsive to a particular discovery request or mandatory disclosure where
24 that data is created after a disclosure or response is made (unless excluded under (B)(3) or
25 (C) (1)-(2) below).

1 3. Absent a showing of good cause by the requesting party, the following categories
2 of ESI need not be preserved:

- 3 a. Deleted, slack, fragmented, or other data only accessible by forensics;
- 4 b. Random access memory (RAM), temporary files or other ephemeral data
5 that are difficult to preserve without disabling the operating system;
- 6 c. On-line access data such a temporary internet files, history, cache,
7 cookies, and the like;
- 8 d. Data in metadata fields that are frequently updated automatically, such as
9 last-opened dates (see also Section (C)(5));
- 10 e. Back-up data that are substantially duplicative of data that are more
11 accessible elsewhere;
- 12 f. Server, system or network logs;
- 13 g. Data remaining from systems no longer in use that is unintelligible on the
14 systems in use;
- 15 h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or
16 from mobile devices (e.g., iPhone, iPad, Android, and Blackberry
17 devices), *provided* that a copy of all such electronic data is routinely saved
18 elsewhere (such as on a server, laptop, desktop computer, or “cloud”
19 storage).

20 **C. ESI Discovery Procedures**

21 1. On-site inspection of electronic media. Such an inspection shall not be permitted
22 absent a demonstration by the requesting party of specific need and good cause or by
23 agreement of the parties.

24 2. Search methodology. Other than in providing initial discovery pursuant to FRCP
25 26(b)(5)(A), the parties shall timely attempt to reach agreement on appropriate search terms,
26 or an appropriate computer- or technology-aided methodology, before any such effort is

1 undertaken. The parties shall continue to cooperate in revising the appropriateness of the
2 search terms or computer-aided methodology.

3 3. De-duplication. The parties may de-duplicate their ESI production across
4 custodial and non-custodial data sources after disclosure to the requesting party.

5 4. Metadata fields. If the requesting party seeks metadata, the parties agree that only
6 the following metadata fields need to be produced: document type; custodian and duplicate
7 custodians; author/from; recipient/to, cc and bcc, title/subject; file name and size, original file
8 path; date and time created, sent, modified and/or received; and hash value.

9 **II. PROVISIONS RELATING TO DISCLOSURE OF PRIVILEGED**
10 **INFORMATION**

11 **A. Applicability**

12 This order shall apply to all deposition transcripts and/or videotapes, and documents
13 produced in response to requests for production of documents, answers to interrogatories,
14 responses to requests for admissions, affidavits, declarations and all other information or
15 material produced, made available for inspection, or otherwise submitted by any of the
16 parties in this litigation as well as testimony adduced at trial or during any hearing
17 (collectively, "Information").

18 **B. Production of Discovery Materials Containing Potentially Privileged Information**

19 1. The production of any privileged or otherwise protected or exempted Information,
20 as well as the production of Information without the appropriate designation of
21 confidentiality, shall not be deemed a waiver or impairment of any claim of privilege or
22 protection, including but not limited to, the attorney-client privilege, the protection afforded
23 to work product materials, or the subject matter thereof, or the confidential nature of any
24 such Information, as to the produced Information, or any other Information.

25 2. The production of privileged or work-product protected documents, electronically
26 stored information ("ESI") or information, whether inadvertent or otherwise, is not a waiver

1 of privilege or protection from discovery in this case or in any future federal or state
2 proceeding. This Order shall be interpreted to provide the maximum protection allowed by
3 Federal Rule of Evidence 502(d).

4 3. The parties agree that documents created in the ordinary course of business and
5 then subsequently identified as being responsive to a discovery request but protected by the
6 attorney-client or other privilege, or needing to have privileged material redacted, will be
7 identified on a privilege log, which will include a reference to the asserted privilege pursuant
8 to FRCP 26(b)(5)(A). However, documents created for the sole purpose of responding to this
9 lawsuit, such as attorney communications with the client and client communications to their
10 attorney in order to gather information to answer discovery requests, file or respond to
11 motions, or that reflect discussions of this lawsuit do not need to be identified on a privilege
12 log as these documents are obviously protected by the attorney-client privilege and/or
13 attorney work product doctrine and were created for the sole purpose of managing this
14 particular lawsuit.

15 4. Before the production of documents, the parties agree to use their best efforts to
16 identify privileged or attorney work product documents.

17 5. A party asserting a claim of privilege or attorney work product after production
18 must give prompt notice to the receiving party. The notice shall be in writing unless the
19 circumstances preclude such notice (*e. g.*, when a claim of privilege is asserted during a
20 deposition). The notice shall specifically identify the document(s) or portions of a document
21 for which the claim of privilege is asserted, and state the basis for the claim.

22 6. Upon receiving written notice from the producing party that privileged and/or
23 work product material has been produced, all such Information, and all copies thereof, shall
24 be returned to the producing party within ten (10) business days of receipt of such notice and
25 the receiving party shall not use such Information for any purpose, except as provided in the
26 next paragraph below, until further Order of the Court. The receiving party shall also attempt,

1 in good faith, to retrieve and return or destroy all copies of the documents in electronic
2 format.

3 7. The receiving party may contest the privilege or work product designation by the
4 producing party, shall give the producing party notice of the reason for said disagreement, and
5 shall be entitled to retain one copy of the disputed document for use in resolving the dispute.
6 However, the receiving party may not challenge the privilege or immunity claim by arguing
7 that the disclosure itself is a waiver of any applicable privilege. The receiving party shall
8 within fifteen (15) business days from the initial notice by the producing party, seek an Order
9 from the Court compelling the production of the material. If no such Order is sought, upon
10 expiration of the fifteen (15) day period, then all copies of the disputed documents shall be
11 returned.

12 8. The receiving party shall immediately place in sealed envelopes any analyses,
13 memoranda or notes which were internally generated based upon such produced information,
14 and shall be destroyed if (a) the receiving party does not contest that the information is
15 privileged, or (b) the Court rules that the information is privileged. Such analyses,
16 memoranda or notes may only be removed from the sealed envelopes and returned to its
17 intended purpose if (a) the producing party agrees in writing that the information is not
18 privileged, or (b) the Court rules that the Information is not privileged.

19 9. Nothing in this Order limits a party's right to conduct a review of documents, ESI
20 or information (including metadata) for relevance, responsiveness and/or segregation of
21 privileged and/or protected information before production.

22 STIPULATED TO this 29th day of April 2015.

23
24 CORR CRONIN MICHELSON
BAUMGARDNER FOGG & MOORE LLP

ROBERT W. FERGUSON
Attorney General

25 s/ David Edwards
26 STEVEN W. FOGG, WSBA # 23528

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Attorneys for Intervenors

12 **ORDER**

13 Based on the foregoing, IT IS SO ORDERED.

14 DATED:

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The Honorable Benjamin H. Settle
17 United States District Court Judge
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1 **Certificate of Service**

2 I certify, under penalty of perjury under the laws of the state of Washington, that I
3 electronically filed a true and correct copy of the foregoing document with the United States
4 District Court ECF system, which will send notification of the filing to the following:
5

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15 DATED this 29th day of April 2015, at Olympia, Washington.

17 s/ Stephanie N. Lindey
18 STEPHANIE N. LINDEY
19 Legal Secretary