No. 85697-4

J.M. JOHNSON, J. (dissenting)—Our legislature has expressed a strong public policy in favor of maintaining the confidentiality of hospital quality assurance records. Confidentiality of this information is necessary to encourage hospitals to engage in candid self-evaluation, which improves the quality of patient care. To foster this policy, we have demanded that medical malpractice plaintiffs develop their cases through "sources other than the records of [a quality improvement] committee," even though this may compromise access to some evidence. *Anderson v. Breda*, 103 Wn.2d 901, 906, 700 P.2d 737 (1985).

While espousing the merits of open discovery, the majority ignores the important statutory purpose of RCW 70.41.200(3), as well as the statute's plain directive that "[i]nformation and documents . . . created specifically for, and collected and maintained by, a quality improvement committee are not

subject to . . . disclosure." PeaceHealth's quality improvement database, including the "list" that Dr. Leasa Lowy mysteriously encountered, plainly qualifies as "information" meeting RCW 70.41.200(3) specifications. It was created and compiled for no other purpose than use by PeaceHealth's quality improvement committee. By ordering the hospital to use its quality improvement database to locate and produce patient records listed therein, the hospital is, in essence, forced to reveal some of the information in the database itself.

The Plain Meaning of RCW 70.41.200(3)

In construing a statute, our primary objective is to ascertain and carry out the legislature's intent. *Lake v. Woodcreek Homeowners Ass'n,* 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). We look first to the plain meaning of the statute itself. *Id.* If the statute is unambiguous, our inquiry ends. *Id.* Only if the meaning of the statute remains unclear should we look to external sources. *Id.*

The meaning of RCW 70.41.200(3) is clear. The statute provides, "Information and documents . . . created specifically for, and collected and maintained by, a quality improvement committee are *not subject to review or*

disclosure, except as provided in this section, or discovery or introduction into evidence." RCW 70.41.200(3) (emphasis added). By using multiple words prohibiting different types of access, the legislature emphasized that this information is not subject to external access *in any form* unless a specific exemption enumerated in RCW 70.41.200 applies. *See also* Final B. Rep. on Engrossed H.B. 2254 (July 24, 2005) ("The review or disclosure of information and documents specifically created for, and collected and maintained by, quality improvement and peer review committees or boards *is prohibited unless there is a specific exemption.*" (emphasis added)). None of the RCW 70.41.200 exemptions apply here.

The majority purports to "narrowly construe" the statute but actually reads the language chosen by our legislature out of the statute. Majority at 1. The statute's prohibition of "disclosure" plainly bars Lowy's discovery request. "[D]isclosure" is defined as "the act or an instance of opening up to view, knowledge, or comprehension." Webster's Third New International Dictionary 645 (2002). By demanding that PeaceHealth cull its privileged database to produce records identified therein, the hospital is forced to open up the database in the form of providing the plaintiff with knowledge of some

of its contents.

The attempt to draw a distinction between "internal" and "external" review of privileged records misses the point. It would be illogical for the hospital to suggest it could not review quality improvement materials for its own purposes—that is the reason the records exist. The problem is that, in this case, Lowy seeks to compel the hospital to review its privileged records for her purposes. In this scenario, the hospital's internal review is actually a proxy for external access to the protected database. The statute does not allow a medical malpractice plaintiff to co-opt a hospital representative to access the hospital's quality review records.

Lowy claims to seek only unprivileged information, but inevitably some privileged information will be disclosed to her by fulfilling her request. PeaceHealth's "Cubes" database is derived from incident reports, which are privileged quality assurance documents. No original source documents are incorporated into the database. In other words, there is nothing within the database that was created for a purpose other than quality review. Accordingly, identifying patient files based upon an internal review of the Cubes database would reveal the cases that were routed to and considered by

the quality improvement committee. Although the majority and the Court of Appeals tried to list what will *not* be disclosed, the plain language of RCW 70.41.200(3) does not permit *any* disclosure absent an exception.

The Statutory Purpose of RCW 70.41.200(3)

We have held the applicability of a quality review statute is to be determined by deciding whether disclosure would interfere with the statutory purpose. *Coburn v. Seda*, 101 Wn.2d 270, 278, 677 P.2d 173 (1984). The purpose of RCW 70.41.200 is to improve the quality of patient care by fostering peer review and encouraging the open reporting of incidents. Records created and maintained for quality review purposes are privileged because the legislature recognized that external access to this information "stifles candor and inhibits the constructive criticism thought necessary to effective quality review." *Anderson*, 103 Wn.2d at 905.

The threat of disclosure promised by the majority decision is bound to deter the filing of incident reports, which will diminish the effectiveness of the internal review mechanism. "[T]he decision by hospital staff members to submit a medical incident report is a key part of the [quality improvement] process." Amicus Curiae Br. of Washington State Hospital Association et al.

at 7. "'Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.'" *Coburn*, 101 Wn.2d at 275 (quoting *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973)).

Hospital staff members will surely think twice before filing an incident report if the existence of the report will be revealed in a malpractice action against a coworker or employer. The prospect of civil discovery inhibiting the candor of medical staff was deemed unacceptable by the legislature. This is why the privilege for quality review materials "embraces [the] goal of medical staff candor in apprising their peers to improve the quality of in-hospital medical practice at the costs of impairing malpractice plaintiffs access to evidence." *Anderson*, 103 Wn.2d at 905.

It is true that RCW 70.41.200(3) may not be used as "a shield to obstruct access to records outside the scope of the privilege." Majority at 21. But, the majority would instead have Lowy use the hospital database as a sword, punishing the hospital for its own quality improvement efforts. Perversely, the more thorough the database and the better its electronic search

capabilities, the more useful it will be for Lowy's purposes. This undermines one of the reasons such records are privileged: to "prevent[] the opposing party from taking advantage of a hospital's careful self-assessment." *Coburn*, 101 Wn.2d at 274.

In fact, the instinctive notion that a party's work should not be turned against it is the only manner in which we have compared RCW 70.41.200(3) to attorney work product privilege. *Id.* The majority attempts to make a broader analogy between the two privileges because the attorney work product privilege is not absolute: work product may be obtained if the opposing party has no other means of obtaining the information without undue hardship. The majority admits "unlike the work product doctrine, the peer review statute at issue does not specifically list any exception to the protection from discovery." Majority at 19. Still, the majority attempts to read a similar undue hardship exception into RCW 70.41.200(3). The essence of the majority's analysis is that the privileged Cubes database should be used to provide Lowy information to use in her malpractice action because she cannot find it elsewhere. RCW 70.41.200(3) does not permit this. Moreover, the statute at issue *does* list exceptions, only none of them

apply here.

The public interest in candid hospital review procedures to improve health care should prevail over a plaintiff's demand for information from the most convenient source. I would recognize that this legislation, RCW 70.41.200(3), prohibits a plaintiff from forcing a hospital to use its privileged quality review materials to reveal cases of confidential incident reports. Because the production of patient files located through reference to a quality review database will necessarily reveal the contents of the database itself, I respectfully dissent.

AUTHOR:

Justice James M. Johnson

WE CONCUR: