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1 ask you not to guess. All right? It's good for you and  
 2 good for us that you not guess at any answers that may  
 3 happen.  
 4 A Okay.  
 5 Q Okay. Fair enough.  
 6 What did you do to prepare for today's interview?  
 7 A I looked over the declaration that I had written. I  
 8 briefly looked over some specifications of the bid  
 9 solicitation, and I tried to find some emails just to  
 10 improve my recollection of time frames, what happened and  
 11 what time.  
 12 Q And I missed that, a what? A miles?  
 13 A Emails.  
 14 Q Emails. Okay. I'm sorry.  
 15 All right. So you looked at emails today, or in  
 16 preparation for today. You looked at your declaration that  
 17 was submitted in the Snohomish District Court?  
 18 A Yes.  
 19 Q And you looked at the bid itself.  
 20 A Yes.  
 21 Q Did you --  
 22 A Well, when I -- it was like a checklist of the  
 23 specifications.  
 24 Q Okay. Had you seen that document before?  
 25 A Yes.

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1 Q All right. Anything else that you reviewed in  
 2 preparation for today's interview?  
 3 A For today's interview, no.  
 4 Q All right. Did you have any consultations or  
 5 conversations with any of your colleagues at the office of  
 6 the state toxicologist in preparation for today's interview?  
 7 A No. Only Shelley.  
 8 Q Okay. And did you have any conversations with any of  
 9 your colleagues from the Washington State Patrol in  
 10 preparation for today's interview?  
 11 A No, I did not.  
 12 Q What about from the office of contracting down in  
 13 Olympia? I forget the exact name.  
 14 MS. WILLIAMS: If I may, Department of  
 15 Enterprise Services.  
 16 MR. DUARTE: Thank you, Ms. Williams  
 17 A No, I did not.  
 18 Q All right. Any other documents that you reviewed for  
 19 the purpose of today's interview?  
 20 A No.  
 21 Q All right. Tell us a little bit about the reason why  
 22 you wanted to review your declaration that was submitted in  
 23 Snohomish. Any particular reason that you wanted to review  
 24 that one in preparation for today?  
 25 A Not really. I didn't really know what questions I

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1 would be asked today, so I thought I'd just start with my  
 2 declaration, figuring you may ask me about my declaration  
 3 Q Yes. In terms of your review of the bid  
 4 specifications, which is what it sounds like you were  
 5 reading, was there a particular reason that you were looking  
 6 for that for purposes of today's interview?  
 7 A I figured -- sorry. I assumed that some questions  
 8 might be around the software or the source code, so I wanted  
 9 to refresh my memory what the actual specification was at  
 10 the time.  
 11 Q And when you say you that were looking to make a  
 12 determination about specifications of the software or the  
 13 source code, did anything come to mind in reviewing this  
 14 document that you would like to tell us about today?  
 15 A Not specifically. I'll answer questions  
 16 Q All right. So generally speaking, tell us, what was  
 17 your involvement in the negotiations for the purchase of the  
 18 Draeger?  
 19 A I started with the Washington State Patrol in  
 20 March 2008. Prior to that, I don't -- I don't have dates --  
 21 the Breath Test Program, which is part of the impaired  
 22 driving section of the patrol, were evaluating several  
 23 different instruments from several different vendors because  
 24 they wanted a new breath test instrument.  
 25 They had narrowed it down to a couple by the time I had

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1 started. When I say "narrow it down," it was just  
 2 they're -- they liked two separate instruments over two  
 3 others.  
 4 So from there, I started meeting with the Breath Test  
 5 Program to hear their ideas about what they wanted in a new  
 6 breath test instrument. This is not in any particular  
 7 order: We called some customers of the vendors; we visited  
 8 some customers of the vendors. And then at some stage, we  
 9 started negotiation -- not negotiations, meetings with  
 10 DES -- Department of Enterprise Services, I believe -- to  
 11 see, you know, how you put a competitive bid out. So there  
 12 were meetings beforehand, during, afterwards, yeah.  
 13 Q So correct me if I'm wrong, it sounds like before the  
 14 Department of Enterprise Services had formally made a bid  
 15 for an instrument, you had already identified two particular  
 16 manufacturers?  
 17 A That were preferred over the other manufacturers, yes  
 18 Q I understand.  
 19 And who were those that you had identified as your  
 20 preferred?  
 21 A Just to clarify, that wasn't myself that I identified  
 22 those other preference at the time; that was the breath test  
 23 program. That was National Patent Services -- I think I got  
 24 the name right -- the Datamaster, the new version of the  
 25 Datamaster that we already had, and Draeger.

9	<p>1 Q All right. And you actually had visited their offices 2 prior to DES formally announcing proposals for bids? 3 A I did not. Someone from the Breath Test Program may 4 have visited the actual offices of the vendors. I went with 5 two others from the Breath Test Program to customers. There 6 was a customer in Vermont and a customer in New York 7 So we wanted to look at their programs, ask them 8 questions about the vendors and their experiences with the 9 instruments and the vendors 10 Q When you talk about customers, who are you referring to 11 specifically? 12 A Oh. It was Vermont, so I think it's the whole state of 13 Vermont. And New York, the state of New York. 14 Q So you were meeting with -- you were visiting other 15 states that were using either the Data- -- the new version 16 of the Datamaster or the Draeger instrument? 17 A Correct. 18 Q All right. So at no time prior to the DES announcing 19 the request for bids did you have any direct contact with 20 Draeger or National Patent? 21 A I do not recall specifically. I can certainly go back 22 and look for that information. Myself, I don't believe so. 23 I know the Breath Test Program -- I believe, I should say -- 24 were in contact with Draeger and National Patent. 25 Q Okay. Prior to the bid being announced here in</p>	11	<p>1 Q When you say "we," are you speaking for the whole 2 agency, or are you speaking about yourself and another 3 person doing these things? 4 A I guess good question. I'm generally referring to the 5 Breath Test Program personnel and myself. We were the ones 6 who were tasked to come up with technical specifications and 7 deal directly with DES, the personnel who were assigned to 8 this contract. 9 So yeah, when I say "we" -- so then DES would've walked 10 us through what they wanted or what they required to follow 11 state laws with a competitive bid. We knew it would have to 12 be a competitive bid, not a sole source. So we would've 13 responded to each of their questions. I know a lot of that 14 was to develop the technical specifications. Not just the 15 technical specifications, but the -- the technical 16 capabilities of what we were looking for in the new 17 instrument and also the administrative side of it, what 18 inputs we wanted, what outputs we wanted, like that whole 19 package. 20 And then we just sort of followed the direction of DES 21 of, you know, how to proceed; whether we could talk to the 22 vendors directly or not; you know, the deadlines involved, 23 whether we had to do more paperwork or justifications about 24 the specifications. 25 So I was involved with the -- the Breath Test Program.</p>
10	<p>1 Washington, did you have any contact directly or indirectly 2 with Draeger specifically on the question of software? 3 A Are you referring to -- so that would be -- so January 4 2009 when the bid first went out. I don't recall 5 specifically. I don't believe so. 6 Q Okay. So you don't believe that you had any contact 7 with Draeger prior to January of 2009 -- 8 A Regarding the source code, correct. 9 Q Now, generally describe for us, what was the 10 contracting process that the State underwent with Draeger? 11 And then two, comment on your role in the process. So 12 again, please tell us what is your understanding of that -- 13 the bidding process or the contracting process, and then 14 next after that, tell us what was your role in that process. 15 A Okay. Remind me of the second one -- 16 Q I will. 17 A -- if I don't get there. 18 Well, I was relatively new to the state of Washington, 19 and every state and city has their own processes for 20 contracting. So we met with our budget and fiscal folk, and 21 they would refer us then to DES, who at the time, we had to 22 go through all contracts through DES. It's different to -- 23 now, we have a contracts department within the patrol. 24 Q May I stop you for a second? 25 A Yes.</p>	12	<p>1 and I believe it was specifically -- Ken Denton and Rod 2 Gullberg came up with the bulk of the technical and the -- 3 let's call them the administrative specifications that they 4 wanted in the breath test instrument. 5 So I was involved with discussions about many of those 6 specifications. I reviewed the specifications before they 7 went in to DES. Roz Knox was the contracting specialist 8 that we dealt with directly in DES, so there are many email 9 correspondence between us all. I went to some meetings 10 directly with Roz Knox. So I feel like I was directly 11 involved with the negotiations -- I wouldn't say 12 negotiations, with the developing the specifications before 13 it went out to bid. 14 Q Okay. A couple of follow-up questions. First, you 15 indicated that you wanted this to be a competitive bid and 16 that your goal was not to have a sole source, meaning a 17 single bidder, correct? 18 A I didn't say that I wanted that. That was our 19 recollection of the State rules. 20 Q All right. So that was the goal on behalf of the 21 State? 22 A Yes. 23 Q Do you know how many companies, in fact, vetted for 24 bidding on the contract? 25 A To my recollection, there was only one company that</p>

<p>13</p> <p>1 actually submitted a bid for this.</p> <p>2 Q And do you know why that was?</p> <p>3 A Not specifically. We had written the specifications</p> <p>4 I mean, they were our wish list; that's what we would want</p> <p>5 in a perfect instrument. We understood, or at least I</p> <p>6 understood, that vendors could question the requirements or</p> <p>7 the specifications. I was expecting more than one vendor to</p> <p>8 bid on the process.</p> <p>9 Q Okay. All right. Let me follow up on your comment</p> <p>10 about the technical specifications, and correct me if I</p> <p>11 misunderstood your comments here this afternoon. I</p> <p>12 understood you to say that Sergeant Ken Denton and former</p> <p>13 Sergeant Rod Gullberg were the individuals primarily tasked</p> <p>14 with developing the technical specifications.</p> <p>15 A To my recollection, they were the two that put pen to</p> <p>16 paper and came up with the specifications, yes.</p> <p>17 Q Okay. And in your review of documents and records and</p> <p>18 emails, do you have any other information to suggest that</p> <p>19 there were any other individuals besides Kenny Denton and</p> <p>20 Rod Gullberg who were the ones primarily responsible for</p> <p>21 developing the technical specifications?</p> <p>22 A I wouldn't use the word "responsible"; they certainly</p> <p>23 volunteered for that. Lieutenant Reichert and myself had</p> <p>24 input into the specifications. There may have also been</p> <p>25 Sergeant Vranish, but I think he started late -- after that,</p>	<p>15</p> <p>1 back Sergeant Vranish because I cannot remember when he</p> <p>2 joined the Breath Test Program. I know he was involved at</p> <p>3 some stage with Draeger and discussing some things, but I</p> <p>4 just can't remember if it was at that point or not.</p> <p>5 Q All right. So help us understand the process.</p> <p>6 Kenny Denton and Rod Gullberg wrote the specifications</p> <p>7 Then I'm assuming they submitted that to you for your</p> <p>8 personal review, correct?</p> <p>9 A Correct.</p> <p>10 Q And I'm assuming that they also submitted what they</p> <p>11 wrote in terms of the technical specifications to Lieutenant</p> <p>12 Reichert, correct?</p> <p>13 A To my recollection, yes.</p> <p>14 Q All right. Now let's talk specifically about your</p> <p>15 role. All right?</p> <p>16 What was your personal involvement in altering,</p> <p>17 modifying, amending the technical specifications that Kenny</p> <p>18 Denton and Rod Gullberg wrote?</p> <p>19 A I know there were several discussions. There were</p> <p>20 several in-person meetings that went for quite a while. I</p> <p>21 don't recall the actual ins and outs of exactly how many</p> <p>22 specifications I commented on or had an opinion on, but I</p> <p>23 was definitely involved in the process.</p> <p>24 Q Okay. I understand that you were involved in the</p> <p>25 process. But beyond what you said, can you give us any more</p>
<p>14</p> <p>1 so maybe not.</p> <p>2 Q Was there an individual who was primarily responsible</p> <p>3 for developing the technical specifications?</p> <p>4 A Well, as I said before, it is my recollection that Ken</p> <p>5 Denton and Rod Gullberg did the bulk of the specifications.</p> <p>6 Q Okay. So when I asked you if they were the ones</p> <p>7 responsible for it, you said no, they sort of volunteered</p> <p>8 for it. And then you commented about others getting</p> <p>9 involved. So I think it's really helpful for us to have a</p> <p>10 clear record as to your best understanding at this moment as</p> <p>11 to who was, in fact, responsible, if anybody, for the</p> <p>12 development of the technical specifications.</p> <p>13 A I guess it's just wording here. It was more that they</p> <p>14 did the specifications. It's not -- I wouldn't -- it was</p> <p>15 more I had a problem with the word "responsibility." It's</p> <p>16 not as if they were specifically tasked to do that. They</p> <p>17 were certainly -- had more expertise than anyone else in the</p> <p>18 Breath Test Program to write -- to write the specifications.</p> <p>19 Q All right. And so they were the ones who wrote the</p> <p>20 specifications. And then after they wrote the</p> <p>21 specifications, it was distributed to you -- is it Captain</p> <p>22 Reichert?</p> <p>23 A Lieutenant.</p> <p>24 Q -- Lieutenant Reichert and Sergeant Vranish?</p> <p>25 A I don't -- we won't mention -- well, sorry. I'll take</p>	<p>16</p> <p>1 clarity or understanding as to your very specific and</p> <p>2 personal role in the development of the technical</p> <p>3 specifications?</p> <p>4 A Well, I think we've covered that Ken and -- Ken Denton</p> <p>5 and Sergeant Gullberg were the ones who developed it. I</p> <p>6 reviewed it, and we discussed it. I do not remember all the</p> <p>7 details.</p> <p>8 Q In your discussions with Kenny Denton and Rod Gullberg</p> <p>9 and any others that were involved in these discussions, did</p> <p>10 you at any point in time amend any of the technical</p> <p>11 specifications that they wrote for the Draeger?</p> <p>12 A I do remember that I did amend them or suggest changes</p> <p>13 I do not recall at this minute the specific technical</p> <p>14 requirements or how many of them.</p> <p>15 Q Okay. So how would we find out which ones you were</p> <p>16 personally responsible or involved in amending or changing?</p> <p>17 A I guess I could go back and look at emails to see</p> <p>18 whether it was -- I had actually emailed some comments or</p> <p>19 corrections. I don't believe anyone took any notes, as in</p> <p>20 specific notes, for the discussions that we had, the</p> <p>21 in-person discussions. I mean, they may have -- we all</p> <p>22 would've written comments on pieces of paper. I don't know</p> <p>23 whether the Breath Test Program kept any of that or not.</p> <p>24 Q In preparation for today's interview, did you read any</p> <p>25 emails that specifically address your involvement in</p>

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1 amending, modifying, or changing the technical  
 2 specifications that Kenny Denton and Rod Gullberg wrote?  
 3 A No.  
 4 Q All right. So you believe that you do have some emails  
 5 that may address this particular point?  
 6 A No. I said that I could go back and look to see if I  
 7 did have any.  
 8 Q All right. So basically, you may or may not have  
 9 emails beyond the ones that you reviewed that might answer  
 10 the questions or the topic that we're covering here today?  
 11 A I may or may not have, correct, yes.  
 12 Q Okay. Well, let me ask you specifically: Did you  
 13 review any particular emails that specifically would help  
 14 you address what involvement, if any, you had in defining  
 15 "software" or "source code"?  
 16 A In -- I'm sorry. In --  
 17 Q In defining "software" or "source code"?  
 18 A Could you elaborate on what you mean by "defining" it?  
 19 Q Yes.  
 20 A As in my definition of it or --  
 21 Q As in on behalf of the State of Washington in the  
 22 process of bidding or dealing with the bid for the contract,  
 23 did you review any emails that would help us understand  
 24 whether or not you had any personal involvement in defining  
 25 "software" or "source code" for the purposes of finalizing

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1 the contract?  
 2 A I have seen emails or I reviewed emails where source  
 3 code was talked about. I do not recall any specific email  
 4 that went into anyone's definition of what "source code" or  
 5 "software" meant.  
 6 Q Okay. Did you review any particular emails that would  
 7 address a discussion between Draeger and the State of  
 8 Washington in terms of defining the term "software" or  
 9 "source code"?  
 10 A I think my answer would be the same.  
 11 Q All right. So the answer is, you've seen emails that  
 12 talk about source code, but for the purposes of this record,  
 13 there are no emails that you saw that discussed the  
 14 definition of "software" or "source code" between the State  
 15 of Washington and Draeger?  
 16 A I'll correct my answer a little bit. It's still not  
 17 what I would call the definition of "software"; that was not  
 18 the main topic. There is at least one email that I remember  
 19 talking about the analytical portion of the software as  
 20 opposed to -- this is not what the email said, but sort of  
 21 the nonanalytical portion of the software. But it was not  
 22 the main topic of the definition of "software" or "source  
 23 code." I just remember that email.  
 24 Q So that the record is clear, Dr. Couper, then there are  
 25 no -- there is no correspondence by way of emails between

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1 the State of Washington and Draeger that discusses the  
 2 definition of "software" or "source code." Is that a  
 3 correct statement?  
 4 A I can't talk about the rest of the patrol, but I do not  
 5 believe I am in possession of an email that talks about  
 6 solely the definition of what "source code" or "software"  
 7 is.  
 8 Q So in the negotiations involving the Draeger  
 9 instrument, did you personally have any discussions with any  
 10 representatives of Draeger regarding the definition of  
 11 "software" or "source code"?  
 12 A No. We were told that we were not meant to directly  
 13 contact the vendor with any questions unless we went through  
 14 the Department of Enterprise Services.  
 15 Q That's my next question, now. Do you personally  
 16 have --  
 17 A Sorry. Until the bid was awarded.  
 18 Q Yes, I understand that. Thank you for the  
 19 clarification, though, because I think it's important;  
 20 you're right.  
 21 In terms of your personal involvement, did you have any  
 22 discussions with DES personnel about the State of  
 23 Washington's definition of "software" or "source code"?  
 24 A It seems like you're hung up on the word "definition"  
 25 So my answer would be no, there were no specific -- I mean,

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1 we would use the term "software" and "source code"; in our  
 2 eyes it was the same thing. We did not define what we meant  
 3 by that with DES. I believe that was your question  
 4 Q Okay. So to you, software and source code may -- meant  
 5 the same thing?  
 6 A Yes.  
 7 Q All right. And at no point in time did you  
 8 specifically have a discussion with any DES employee, then,  
 9 to distinguish what software is versus source code, correct?  
 10 A Correct.  
 11 Q All right.  
 12 Now, we have made a public disclosure request to DES,  
 13 the patrol, for all documents related to the bid, the  
 14 contract with Draeger, and nowhere do we see any documents  
 15 that discuss the differentiation between software and source  
 16 code for the Draeger instrument.  
 17 Are you aware of any documents in the contracting -- in  
 18 the contracting process that distinguishes between software  
 19 and source code?  
 20 A I do not believe I know of any document.  
 21 Q Now, were you involved in any of the solicitation  
 22 amendments that were agreed upon between the State of  
 23 Washington and Draeger?  
 24 A To clarify: Is this when Draeger had asked for all the  
 25 amendments, and is this, then, our response, the Washington

21	<p>1 State Patrol's response, whether we agreed with the 2 amendments - 3 Q Yes. 4 A -- or not? Yes, I was. 5 Q All right. Tell us specifically, what was your 6 involvement in that process? 7 A I met with the Breath Test Program again; we went 8 through Draeger's comments. And we had discussions of 9 whether we would agree to them or not, or whether we wanted 10 to amend their amendment. And I was involved with email 11 exchanges in response to that. 12 Q Specifically what was your role? In other words, did 13 you make any particular decisions about the solicitation 14 amendments on behalf of the State of Washington? 15 A I would have to look through my emails again to have a 16 proper recollection of that. 17 Q In any of the emails that you've reviewed today in 18 preparation for today's interview, did that address the 19 topic of the solicitation amendments? 20 A I don't believe so. 21 Q Okay. 22 MR DUARTE: All right. Let's pause for a 23 second, please. 24 (Break was taken.) 25 Q (By Mr. Duarte) So, Dr. Couper, when I took a break.</p>	23	<p>1 A No. 2 Q All right. So when you were telling us that you were 3 reviewing some technical specifications, what were you 4 looking at? What did that document look like? 5 A Very similar. I don't know if it had a different title 6 or not. It was, I believe, Draeger's initial response or 7 what they submitted back to DES, so it would've had 8 checkmarks in the second column, "check if meet or exceed" 9 And I believe it had some comments in the third column 10 Q In the third column? 11 A "Describe offered equal." 12 Q All right. So it's something similar to Exhibit 1, 13 except that you saw some checkmarks along the page in the 14 columns that were relating to specific specification items? 15 A Correct. 16 Q All right. So why don't you turn to Item No. 6 of 17 Exhibit 1, which addresses the software. Do you see that? 18 A Yes, I do. 19 Q And then for the record, please read Item 6 as it 20 appears in Exhibit 1 21 A "Instrument software must be made available under 22 protective order of release for discovery purposes and legal 23 challenges." 24 Q All right. And then when we turn to your declaration, 25 page 2, Paragraph 6, you substituted the word "source code"</p>
22	<p>1 it was clear that the State of Washington made no 2 distinction between the definition of "software" or "source 3 code," correct? 4 A I think that's a correct statement. 5 Q All right. 6 Now, I want to turn you to -- attention to your 7 declaration that was submitted in the matter of State of 8 Washington versus Mark Flanigan, F L A N I G A N, et al, 9 Cause No. 5303A-1SD. 10 All right. I want to ask you to turn to page 2 of the 11 document. And I want to ask you a couple of questions about 12 that page, specifically as it relates to the technical 13 specifications. 14 (Exhibit No. 1 marked for identification.) 15 Q I'm showing you what's been marked as Exhibit 1 to your 16 interview. It's titled, "Washington State Patrol Impaired 17 Driving Section Evidentiary Breath Test Instrumentation 18 Specifications." 19 Now, I'm guessing that the answer to the question about 20 your familiarity with this document, would be yes. But 21 could you confirm for us whether or not you are familiar 22 with this exhibit? 23 A Yes, I am. 24 Q All right. Is this the same document that you reviewed 25 earlier in preparation for today's interview?</p>	24	<p>1 for "software." Why did you do that? 2 A I wouldn't say I substituted it. I did not write my 3 declaration in specific response to Item No. 6 for the 4 specifications. 5 Q So let's be clear. When you signed the declaration 6 that was submitted in the matter of the State of Washington 7 versus Mark Flanigan, you did not review the bid document 8 that related specifically to the language that you just read 9 for us on the record? 10 A I believe I did review this document in preparation for 11 my declaration, but I wouldn't say that I supplanted the 12 word "software" for "source code." In my mind, I just used 13 the word "source code," so that's naturally what I put in 14 the declaration. 15 Q Okay. Did you personally write this declaration? 16 A Yes, I did. 17 Q All right. And so you do know the reason why we asked 18 you to be available today for an interview, correct? 19 A I believe it's because there are ongoing hearings in 20 Snohomish and elsewhere. 21 Q And do you know specifically the subject matter that 22 brings us to this room today to talk about this litigation? 23 A It involves the source code. 24 Q All right. So you continue to use the word "source 25 code" instead of "software." Tell us why.</p>

25	<p>1 A I don't think there's any, like, real reason behind it.</p> <p>2 We always referred to -- "we," the Breath Test Program and</p> <p>3 myself -- in discussions, we typically always referred to</p> <p>4 source code. This started from -- for example, in Florida</p> <p>5 years ago -- I don't know exactly which year, it may have</p> <p>6 been 2004 -- there was a source code issue. In New Jersey,</p> <p>7 there was a source code issue. So it was just our</p> <p>8 understanding at the time and now that it was the source</p> <p>9 code.</p> <p>10 Q So when you use the terms "source code," "software,"</p> <p>11 et cetera, you're not using it in terms of its technical</p> <p>12 definition in its appropriate field of science, meaning in</p> <p>13 computer science?</p> <p>14 A No. We're -- sorry. I, and I'm assuming the Breath</p> <p>15 Test Program, are using it in our own definition. I don't</p> <p>16 want to get hung up on the word "definition." Our own</p> <p>17 definition of what soft code -- source code is. We are</p> <p>18 definitely not IT personnel at all; it's just what we think</p> <p>19 of as source code.</p> <p>20 Q So what you're really talking about is a layman's</p> <p>21 understanding of the word "source code" versus "software,"</p> <p>22 correct?</p> <p>23 A I think that's fair to say, yes.</p> <p>24 Q So at no point in time when you use a distinction</p> <p>25 between the word -- the phrase "source code" and the word</p>	27	<p>1 terms of "software" and "source code" as it relates to the</p> <p>2 world of computer science?</p> <p>3 A Sorry. What was the start of that? Would I, did you</p> <p>4 say?</p> <p>5 Q Yes. Would you defer to a computer science --</p> <p>6 A If I needed to know that, yeah. I would ask an IT</p> <p>7 person.</p> <p>8 Q Okay. And at no time during the contract negotiations</p> <p>9 with Draeger did you specifically ask anyone under your</p> <p>10 command or under your colleagues to how the State of</p> <p>11 Washington defined the technical definition in the field of</p> <p>12 computer science for the terms "software" and "source code"?</p> <p>13 A I did not, and I don't believe anybody from the Breath</p> <p>14 Test Program did.</p> <p>15 Q Okay. When we turn back to your declaration, you never</p> <p>16 meant anything -- you never meant to specifically refer to</p> <p>17 the source code and the understood technical definition in</p> <p>18 the field of computer science?</p> <p>19 A That would be a correct statement.</p> <p>20 Q And if you were asked to come to court to testify about</p> <p>21 the distinction between "software" and "source code," you</p> <p>22 would not be telling the Court that you know, in fact, the</p> <p>23 distinction between these two terms in the field of computer</p> <p>24 science, correct?</p> <p>25 A That's correct.</p>
26	<p>1 "software," are you meaning a technical definition in its</p> <p>2 field of computer science?</p> <p>3 A I think that's correct, if I understand your question.</p> <p>4 Q Well, let me ask it this way: You do understand -- do</p> <p>5 you not? -- that in the field of computer science, there is</p> <p>6 a technical definition for "software" and for "source code."</p> <p>7 A I assume there would be specific definitions. I don't</p> <p>8 know them.</p> <p>9 Q And when you are talking to us here today about</p> <p>10 software and source code, again, you're not using them in</p> <p>11 terms of the technical definitions in the field of computer</p> <p>12 science?</p> <p>13 A It may be one and the same thing. But no, I'm not</p> <p>14 referring to the technical definitions, which I'm not aware</p> <p>15 of.</p> <p>16 Q Why would you say it might be one and the same thing,</p> <p>17 when you have no knowledge of the technical definitions in</p> <p>18 computer science?</p> <p>19 A Well, it's pure coincidence. They could be the same</p> <p>20 thing.</p> <p>21 Q Okay. Do you know if they are, in fact, the same thing</p> <p>22 in the field of computer science?</p> <p>23 A No. I don't know what the definition is in the field</p> <p>24 of computer science.</p> <p>25 Q Will you defer to a computer scientist to define the</p>	28	<p>1 Q In fact, what you would be telling the Court is that</p> <p>2 you assume that software and source code mean the same</p> <p>3 thing.</p> <p>4 A More or less, yes.</p> <p>5 Q All right. Okay. But it is true, is it not, that the</p> <p>6 actual technical specification bid used the term "software"</p> <p>7 as opposed to "source code," correct?</p> <p>8 A Yes.</p> <p>9 Q And it is true, is it not, that the solicitation</p> <p>10 amendments to Paragraph 6 of the technical specifications</p> <p>11 which are identified as Exhibit I, use the term "software"</p> <p>12 as opposed to "source code," correct?</p> <p>13 A I'm sorry. The amendments?</p> <p>14 Q Yes.</p> <p>15 A I'm sorry. Are you referring to this actual language</p> <p>16 here, or were -- I'm sorry. I'm not quite sure what you're</p> <p>17 referring to.</p> <p>18 Q All right. I'm going to help you with that because I</p> <p>19 think, based on your answer, I can tell that maybe it might</p> <p>20 be helpful if I show you some documents. Okay?</p> <p>21 MR. DUARTE: Would you be so kind to mark this</p> <p>22 one as the next exhibit in order?</p> <p>23 (Exhibit No. 2 marked for identification.)</p> <p>24 MR. DUARTE: And the next one.</p> <p>25 (Exhibit No. 3 marked for identification.)</p>

29	<p>1 MR. DUARTE: Thank you.</p> <p>2 THE REPORTER: You're welcome.</p> <p>3 Q Dr. Couper, I would ask you to take a look at Exhibits</p> <p>4 1, 2, and 3 at the same time; it would help. I represent to</p> <p>5 you that Exhibit 1 was the final technical specifications</p> <p>6 document related to the Draeger contract. Okay? I</p> <p>7 represent to you that Exhibit 2 was the first solicitation</p> <p>8 amendment to the original bid.</p> <p>9 A Prior to this being the final?</p> <p>10 Q Yes.</p> <p>11 A Right.</p> <p>12 Q This is the final --</p> <p>13 A Right.</p> <p>14 Q -- Exhibit 1. And then Exhibit 3 was the second</p> <p>15 solicitation amendment to the original technical</p> <p>16 specification bids. Okay?</p> <p>17 A Okay.</p> <p>18 Q All right. So for the record, please read to us the</p> <p>19 comments -- the question and the response as it relates to</p> <p>20 Exhibit 2 that relates to, again, Specification 6 of</p> <p>21 Exhibit 1.</p> <p>22 A Okay. I'm sorry. Did you want me to read that?</p> <p>23 Q Yes, for the record. We want to have that on the</p> <p>24 record.</p> <p>25 A Under the column "Questions," Item No. 6: "Vendor</p>	31	<p>1 not as long as the question.</p> <p>2 A No. Responses referring to model contract Section 8.5.</p> <p>3 "Suggested Change: Ownership/Rights in data. This section</p> <p>4 of the contract will not apply as it is in direct conflict</p> <p>5 with Item 6 of contract specifications, which states the</p> <p>6 following: 'Instrument software must be made available</p> <p>7 under protective order of release for discovery purposes and</p> <p>8 legal challenges.'</p> <p>9 "The State of Washington is acknowledging that</p> <p>10 ownership of the software relating to this Contract is and</p> <p>11 remains the property of the manufacturer. Section 8.5 of</p> <p>12 the Model Contract does not bear out this understanding, and</p> <p>13 therefore does not apply</p> <p>14 "All intellectual property, including without</p> <p>15 limitation all manufacturing, process and other know-how and</p> <p>16 all designs, specifications and drawings associated with the</p> <p>17 Contractor's Products or the manufacture thereof (including</p> <p>18 without limitation all such intellectual property developed</p> <p>19 by Contractor after the date of this Agreement) is and shall</p> <p>20 at all times remain the exclusive property of Contractor.</p> <p>21 Purchaser shall preserve and protect the confidentiality of</p> <p>22 all such intellectual property by all practicable means,</p> <p>23 shall permit it to be shared only with such employees of</p> <p>24 Purchaser as need to know it for the purpose of Purchaser's</p> <p>25 performance of its obligation under this Agreement, subject</p>
30	<p>1 would like to see this more restrictive limiting the source</p> <p>2 of a Protective Order." And -- sorry The next column,</p> <p>3 "Responses" "Suggested Change: Instrument software must</p> <p>4 be made available under Court mandated protective order of</p> <p>5 release for discovery purposes and legal challenges."</p> <p>6 Then it says (As read): WSP: Agrees to change the --</p> <p>7 change to the vendor's suggested wording.</p> <p>8 Q Okay. And then do the same for Exhibit 3 so that we</p> <p>9 have it on the record, please</p> <p>10 A Reading which --</p> <p>11 Q Again, the section that relates to --</p> <p>12 A The highlighted?</p> <p>13 Q No. May I have it back, please?</p> <p>14 A Sorry There wasn't a --</p> <p>15 Q Thank you.</p> <p>16 (Pause in the proceedings.)</p> <p>17 Q I'm not going to ask you to read it because this is</p> <p>18 relatively long. What I would ask you to do is, take a look</p> <p>19 at the response section that relates to the model contract</p> <p>20 Section 8.5.</p> <p>21 A The response?</p> <p>22 Q Yes, please.</p> <p>23 A And I'm sorry. Did you want me to read that?</p> <p>24 Q Why don't you go ahead and read it so we have it for</p> <p>25 the record. But just the response. It's not long. It's</p>	32	<p>1 to such employees having a duty of confidentiality with</p> <p>2 respect thereto the same as required by Purchaser</p> <p>3 hereunder."</p> <p>4 Q All right. So it is true, is it not, that as we review</p> <p>5 Exhibits 1, 2, and 3, the terminology that is used is</p> <p>6 "software," correct?</p> <p>7 A Correct.</p> <p>8 Q And in none of these documents there is a reference to</p> <p>9 "source code," correct?</p> <p>10 A That word is not used, correct.</p> <p>11 Q All right. And, in fact, to your understanding, there</p> <p>12 is absolutely no document that relates to the Draeger</p> <p>13 contract that specifically defines "software" or "source</p> <p>14 code" or both, correct?</p> <p>15 A That defines them or separates them, correct.</p> <p>16 Q All right</p> <p>17 A To my knowledge.</p> <p>18 Q All right. One of the reasons why you're here,</p> <p>19 Dr. Couper, is because there is a debate about the</p> <p>20 difference between software and source code. Okay? And you</p> <p>21 might be aware that the defense, individuals who have been</p> <p>22 charged with driving under the influence and who have taken</p> <p>23 a test with the Draeger, want to do an analysis of the</p> <p>24 software. You are aware of that, correct?</p> <p>25 A Correct.</p>



33	<p>1 Q Do you have a -- an objection to DUI defendants being 2 able to do an analysis of the software? 3 A In essence, no. But I will say, I don't actually still 4 know what, let's say, the defense's definition of "software" 5 is. But in essence, no. 6 Q All right. Let's assume for a moment that you and I 7 are talking about different definitions of "software" and 8 "source code" for the purposes of this discussion. 9 Do you have a personal opinion on behalf -- well, let 10 me back up. 11 Do you have an opinion, as the Washington State 12 toxicologist, that the defendant should be allowed to do an 13 analysis only of the source code, as opposed to being able 14 to do an analysis of the source code and its -- and the 15 software that relates to the Draeger? 16 A Can you say that again? 17 Q Yeah. Let me say that again. 18 A I'm sorry. Yeah. 19 Q Let me say that again. 20 Okay. Do you have an objection -- let me back up. 21 Again. Assuming there's -- there is a distinction, 22 actually, in the field of computer science -- 23 A Okay. I was going to say, assuming that there is 24 Q -- between software and source code. Okay? 25 So let me ask you first: Do you, as the Washington</p>	35	<p>1 code/software, again meaning the same thing. 2 Q And let's say that the State of Washington meant really 3 source code, not to include all the architectural 4 information that we've been talking about. But assuming 5 that a defendant says, "I know that's what it says in the 6 contract, but I want to be able to do an analysis of the 7 entire software," do you, as the Washington State 8 toxicologist, have an objection to that? 9 A I do not have an objection to that. But I'll limit 10 that to -- you know, what am I trying to say? I didn't know 11 then, and I'm only recently aware of architectural items, 12 that they are separate to source code. 13 I'm sorry. I've forgotten your question. I'm sorry. 14 Q That's okay. But let's assume that there is a 15 difference -- 16 A Sorry. I think I was going to say, I don't have an 17 objection but that architectural items, which I still don't 18 understand what it is, aren't mine or the patrol's to decide 19 on. So I think that's a legal issue. Do I have an 20 objection? No. 21 Q Okay. Let's leave the legal issues for the Court 22 because I think that would be fair to you and me as we 23 discuss things here today. 24 But, for example, if you were to be called to testify 25 anywhere in the state of Washington about what sort of</p>
34	<p>1 State toxicologist, have an objection to a DUI defendant 2 being able to do an analysis of the source code? 3 A No, I do not. 4 Q Okay. Assuming that software includes source code and 5 architectural information, computing software information 6 about the Draeger machine, do you, as the Washington State 7 toxicologist, have an objection to the defendant being able 8 to do an analysis of the complete software? 9 A In essence, no, I do not. 10 Q And isn't it true that there is nothing in the contract 11 between the State of Washington and Draeger that says that 12 the defendant is limited to an analysis of the source code 13 only as opposed to the complete software of the Draeger? 14 A There is no definition in all of this paperwork that 15 distinguishes between the two. 16 Q Right. In fact, what it does say is that the software 17 will be made available pursuant to a protective order for 18 litigation purposes, correct? 19 A Correct. 20 Q And you understood that to mean that the defense would 21 have an opportunity to ask for the software and be able to 22 pursue an independent analysis of its operation, correct? 23 A At the time, we thought software and source code were 24 the same thing. So yes, meaning we thought the defense 25 could have/should have the right to the source</p>	36	<p>1 analytical opportunity a criminal defendant would have in 2 terms of assessing the Draeger software, would you ever come 3 to court and testify that there is any particular provision 4 in the contract between the State of Washington and Draeger 5 that says the defense analysis has to be limited to the 6 source code and he cannot include the complete package, 7 meaning the complete software? 8 A That was a very long question. Could you -- 9 Q It was. 10 A -- shorten that a bit? 11 Q Yes. 12 MR. SULLIVAN: I typed it up if you want to 13 repeat it. 14 MR. DUARTE: Okay. Thank you. 15 Q Let me see if I can do it shorter; if not, we'll reread 16 it. Okay? 17 A Yeah. No. I just can't remember what your actual 18 question was. I remember the context of it. 19 Q The context. 20 A Your actual question, though? 21 Q Thank you. That's good. Thank you, Dr. Couper. 22 If you were testifying in court, would you be pointing 23 to any particular provision anywhere in the Draeger contract 24 that says that a DUI defendant is limited only to an 25 analysis of Draeger's source code?</p>

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1 A Okay. It was our intent at the time that it just meant  
 2 source code, but I would not testify -- I'm sorry. Is this  
 3 your question? -- that a defendant couldn't ask for -- to  
 4 review other materials.  
 5 Q I'm puzzled by your answer that it was your intent to  
 6 mean source code when, in fact, you told us that you didn't  
 7 know that there was a distinction between software and  
 8 source code. So how would one intend something to be when  
 9 they don't know what that is? See what I'm saying?  
 10 A Yes and no. We thought source code and software were  
 11 the same thing.  
 12 And by that, maybe it might help to say what I thought  
 13 or the patrol thought what source code was. We thought it  
 14 was the computer package, the code that was kind of  
 15 stand-alone inside each instrument that determined, you  
 16 know, based on input from the officer, input of the breath,  
 17 that it spat out a breath test result, and, you know, here's  
 18 the printout. We didn't know that there were other kinds of  
 19 items elsewhere.  
 20 So when I say we -- it was our intent with the source  
 21 code/software, that's what we intended.  
 22 Q Dr. Couper, I know that you have your declaration with  
 23 you here today.  
 24 A Yes.  
 25 Q Would you please take a look at it. And I'm going to

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1 direct your attention to page 2, Paragraph 10. I understand  
 2 that what you said here is, the WSP, meaning the Washington  
 3 State Patrol, did not intend to require the vendor to  
 4 produce items other than the source code under a protective  
 5 order, such as architectural items used to design or develop  
 6 the software or the instrument.  
 7 Did I read that correctly?  
 8 A That's correct.  
 9 Q All right. So if you didn't know what the definition  
 10 of source code or software were at the time of this  
 11 contract, how could you have intended what you say here in  
 12 Paragraph 10, page 2, of your declaration?  
 13 A I guess I'm not getting at your distinction or your  
 14 differences here. Had we known that there were other items  
 15 at the time, we may have included them. We didn't know  
 16 there were other items at the time, so it was our intent  
 17 that they would hand over the source code/software under  
 18 protective order if requested.  
 19 Q Okay. So if I understand your answer correctly, if you  
 20 knew that software meant more than the source code and  
 21 included the architectural items used to design or develop  
 22 the software for the instrument, you would have explicitly  
 23 included that language in the Draeger contract, correct?  
 24 A I don't know if we would've explicitly included it; we  
 25 would've considered it if we knew it existed and we thought

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1 it was relevant to the operation of the instrument.  
 2 Q Let's take the flip side.  
 3 You would not have intended at the time that the  
 4 contract was done to limit, to exclude, for example, the  
 5 architectural items used to design or develop the software  
 6 for the instrument if you knew that software included these  
 7 items, correct?  
 8 A I'm sorry. What was the question again?  
 9 Q Yes. In other words --  
 10 A I mean, I know in retrospect.  
 11 Q Right. But was it your intent in any way to limit a  
 12 defendant's ability to fully analyze the source code and the  
 13 architectural items used to develop the software for the  
 14 instrument? Was that ever any intent by the State of  
 15 Washington?  
 16 A To answer that question, no, that was not the intent,  
 17 to limit the defendant's request for anything.  
 18 Q All right. So today we are asking not only for the  
 19 source code, but we're also asking for the architectural  
 20 items used to design or develop the software for the  
 21 instrument. Okay?  
 22 Knowing that, do you on behalf of the State of  
 23 Washington, as the Washington State toxicologist, do you  
 24 have an objection to the defense getting all these  
 25 documents -- all this information, rather, to do a full

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1 analytical analysis of the software?  
 2 A Well, for what my opinion is worth, I do not have a  
 3 personal stake in this or a professional stake in this. If  
 4 the defense wanted this, I see no reason that they can't ask  
 5 and be given these architectural items.  
 6 Q Okay.  
 7 A I'll clarify it: Assuming that they believe it is  
 8 relevant.  
 9 Q Now, when you were talking to us about what you  
 10 understood the software to be, it was those items that were  
 11 installed in the instrument, correct?  
 12 A Correct.  
 13 Q Are you aware that the source code, in fact, is not  
 14 installed on the instrument? Were you aware of that?  
 15 A I can probably say I was not aware of that.  
 16 Q All right. So if we were to go by your definition even  
 17 of "source code" or "software," you realize that it actually  
 18 would have included the architectural items used to design  
 19 or develop the software for the instrument because that's  
 20 what's in the machine, or the instrument. Did you realize  
 21 that?  
 22 A That the architectural items are what's in the  
 23 instrument? No, I didn't know the distinction.  
 24 Q Okay. And to the extent that there are any  
 25 architectural items used to design or develop the software

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1 for the instrument that are not downloaded on the instrument  
 2 itself, again you have no objection to the defense being  
 3 able to get those in order to do a full analytical analysis  
 4 of the software?  
 5 A I do not have an objection to that.  
 6 Q Okay. Do you know if the Washington State Patrol has  
 7 an objection to the defendant being able to have the  
 8 software and the architectural items that were used to  
 9 design or develop the software of the instrument in order to  
 10 conduct a full analytical analysis of the software?  
 11 THE WITNESS: I'm going to turn to you here  
 12 A I don't believe the patrol, the Washington State  
 13 Patrol, has come out with a statement to the contrary or  
 14 agreeing with that.  
 15 Q Okay. Since this litigation started in Snohomish and  
 16 elsewhere regarding the software, have you had any  
 17 discussions with your colleagues, either in the office of  
 18 the state toxicologist or the Washington State Patrol,  
 19 taking the position on behalf of State of Washington that  
 20 the defendants should be limited in their ability to do --  
 21 that defendants should be limited in what they get for  
 22 analytical analysis of the software?  
 23 A No. We have -- specifically referring to that, no.  
 24 Q Okay. Have you had any discussions with any agents,  
 25 representatives, employees of Draeger since the litigation

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1 has commenced around the state of Washington regarding what  
 2 portions of the software should be made available or could  
 3 be made available to a defendant who is charged with DUI?  
 4 A I have not, no.  
 5 Q Do you know if anyone in the office of the state  
 6 toxicologist has had any discussions with Draeger  
 7 representatives, agents, or employees?  
 8 A I do not know that.  
 9 Q Do you know if anyone from the Washington State Patrol  
 10 has had any contact with Draeger's employees, agents, or  
 11 representatives to discuss what information they will or  
 12 will not be giving the defense for an analytical analysis of  
 13 the software?  
 14 A I do not know.  
 15 Q If something like that --  
 16 A Sorry. As in, I don't know specifically whether they  
 17 have or not.  
 18 Q If something like that would have happened, would that  
 19 come to your attention?  
 20 A I don't know. I don't know the answer to that  
 21 question  
 22 Q Would you expect it, as the state toxicologist, that  
 23 you would be advised of items like this, of great  
 24 importance, around the state of Washington involving Draeger  
 25 litigation?

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1 A Yes. And we have had several discussions on this  
 2 litigation and the source code. But whether -- I am just  
 3 not aware if anyone -- I mean, I believe Ms. Williams has  
 4 contacted Draeger. I don't know of -- if anyone within the  
 5 patrol has --  
 6 Q So what sort of --  
 7 A -- dealt with them.  
 8 Q Thank you.  
 9 What sort of discussions have you had about this  
 10 litigation?  
 11 MS. WILLIAMS: Object to the extent it calls  
 12 for attorney-client information.  
 13 You may continue.  
 14 THE WITNESS: Does that mean I answer or not?  
 15 Q Yes, that means you answer.  
 16 A Oh, okay.  
 17 Q I'm going to help you --  
 18 A Sorry.  
 19 Q -- Dr. Couper.  
 20 You understand that Ms. Williams here is representing  
 21 the State of Washington, correct?  
 22 A Correct. Representing the state patrol.  
 23 Q The state patrol. So is she here representing the  
 24 office of the state toxicologist?  
 25 A She's representing the state patrol.

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1 Q All right. Including the office of the state  
 2 toxicologist?  
 3 A Yes.  
 4 Q Okay. The record needs to be clear --  
 5 A Okay.  
 6 Q -- okay? Thank you.  
 7 All right. Anything she said to you about this  
 8 litigation, I'm not asking you for. Okay? Because that  
 9 would be protected information, client-attorney privilege  
 10 Okay? However, your conversations with your colleagues  
 11 within the office of the state toxicologist and the  
 12 Washington State Patrol is not attorney-client  
 13 communication. Okay?  
 14 A What if Ms. Williams was present?  
 15 Q I don't know. It could be or it could not be because  
 16 third parties in a room would defeat the attorney-client  
 17 privilege, so we would need to know the composition of that  
 18 whole meeting. Okay?  
 19 So my question again was, what conversations, if any,  
 20 have you had, other than with your attorney, about the  
 21 Draeger litigation?  
 22 A I've had conversations with Lieutenant Sharpe,  
 23 Lieutenant Rob Sharpe.  
 24 Q And what was the nature of that conversation?  
 25 A They were just very -- I guess I would term them

45	<p>1 general, you know, what his beliefs or thoughts on</p> <p>2 happenings in Snohomish, and I think it was Kittitas County.</p> <p>3 and possibly Island County about -- I'm just going to refer</p> <p>4 here to the source code issue, the software issue. So we</p> <p>5 just had some conversations about that.</p> <p>6 I have been in a meeting with the chief of the patrol,</p> <p>7 Chief Batiste, and my direct boss, Director Larry Hebert,</p> <p>8 and also the deputy chief. And Lieutenant Reichert was in</p> <p>9 the room, as well, as well as Ms. Williams, and we were just</p> <p>10 discussing many things, but then, you know, how to move</p> <p>11 forward with responding to either Kittitas or Snohomish,</p> <p>12 just in general terms.</p> <p>13 Q So, you know, basically, what's happening in these</p> <p>14 cases is that we're asking for the ability to do an</p> <p>15 analytical analysis of Draeger's software. In these</p> <p>16 discussions, did the Washington State Patrol and/or the</p> <p>17 office of the state toxicologist take a position about what</p> <p>18 limited information a defendant would get for the purposes</p> <p>19 of conducting a software analysis?</p> <p>20 A No.</p> <p>21 Q Okay</p> <p>22 A Yes. No. So I'm just trying to remember your actual</p> <p>23 question. No, we did not discuss any limitations at all.</p> <p>24 Q And is there going to be any discussions, to your</p> <p>25 knowledge, that will address any limitations that the</p>	47	<p>1 provision, it was later changed, where the State of</p> <p>2 Washington surrendered the requirement that it owned the</p> <p>3 software resultant in what is the solicitation amendment,</p> <p>4 Exhibit 3. Do you see that?</p> <p>5 A Yes.</p> <p>6 Q Can you tell us -- can you speak to us on behalf of the</p> <p>7 office of the state toxicologist as to the reason why the</p> <p>8 office of the state toxicologist chose not to own the</p> <p>9 software?</p> <p>10 A I would have to refer to emails to refresh my</p> <p>11 recollection of this. It would not be the office of the --</p> <p>12 there is no office of the state toxicologist.</p> <p>13 Q Oh, okay.</p> <p>14 A So in that, I'd be answering for the patrol. I would</p> <p>15 have to look back to see if there were -- I had any notes or</p> <p>16 emails regarding -- I mean, I'm just going to believe you</p> <p>17 that we had that provision in the start. I don't remember</p> <p>18 the details of when it was changed.</p> <p>19 Q Yeah. I mean, I'm happy to show it to you, because I</p> <p>20 want you to be completely confident and comfortable in my</p> <p>21 representations to you. Okay?</p> <p>22 A It is definitely not a detail I remember that we had</p> <p>23 wanted ownership and then we agreed to change.</p> <p>24 Q So why the change?</p> <p>25 A Well, I can't answer that because I can't remember the</p>
46	<p>1 Washington State Patrol and/or the office of the state</p> <p>2 toxicologist would like to see?</p> <p>3 A Sorry. Will there be?</p> <p>4 Q Yes.</p> <p>5 A Not to my knowledge, no.</p> <p>6 Q Okay. So it doesn't sound to me that either the</p> <p>7 Washington State Patrol or the state toxicologist has taken</p> <p>8 a position that would prevent the defense from securing the</p> <p>9 software and the architectural items that were used to</p> <p>10 design the software and the instrument.</p> <p>11 A We have not taken a stance on this, no.</p> <p>12 Q Do you plan to take one on behalf of the State of</p> <p>13 Washington?</p> <p>14 A No.</p> <p>15 Q Okay. All right.</p> <p>16 Now, the other part that I wanted to ask you about --</p> <p>17 and we're switching gears a little bit, Dr. Couper -- is</p> <p>18 related to Exhibit 3, the solicitation amendment that you</p> <p>19 reference related to the model contract provision</p> <p>20 Section 8.5. Okay?</p> <p>21 Now, you are aware that in the initial bid for the</p> <p>22 software and the instrument, that the State of Washington</p> <p>23 required ownership of the software?</p> <p>24 A I do not recall that detail.</p> <p>25 Q Okay. And then as a result of that particular</p>	48	<p>1 details.</p> <p>2 Q All right.</p> <p>3 A I don't -- it may have been -- what should I say? --</p> <p>4 legal wording that was included. I don't know -- I can't</p> <p>5 remember now if that was a Washington State Patrol</p> <p>6 specific -- that we wanted that language or we were advised</p> <p>7 by DES to have that language. I just don't recall at this</p> <p>8 time that we had it and then we changed it.</p> <p>9 Q I represent to you, Dr. Couper, that we had an</p> <p>10 opportunity to interview an employee of the Department of</p> <p>11 Enterprise Services, and these individuals indicated to us</p> <p>12 that in the past, the State of Washington has, in fact,</p> <p>13 contracted ownership of software. I wouldn't say that he</p> <p>14 spoke on behalf of the Washington State Patrol, but on</p> <p>15 behalf of other agencies where that has happened. Okay?</p> <p>16 So knowing that, did the Washington State Patrol have a</p> <p>17 decision when they developed the contract, or the bid for</p> <p>18 the contract, that the Washington State Patrol did not want</p> <p>19 to own the software?</p> <p>20 A I just don't recall those details right now.</p> <p>21 Q What would we need to do to figure out these details so</p> <p>22 that we can talk about it competently?</p> <p>23 A Off the top of my head is, just try to review some of</p> <p>24 the emails I have, just to see whether the topic had come up</p> <p>25 or not.</p>

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1 Q Okay. So to your knowledge as we sit here today, you  
 2 cannot tell us one way or the other whether or not the  
 3 Washington State Patrol had a position about owning or not  
 4 owning the software?  
 5 A That's correct  
 6 Q And you cannot tell us why the change from,  
 7 specifically in the model contract, requiring ownership of  
 8 the software and then changing that to not having ownership  
 9 of the software?  
 10 A Sitting here today, I can't comment on that  
 11 Q Besides you, would there be any other person that can  
 12 competently speak to this issue as it relates to the Draeger  
 13 contract?  
 14 A I would refer to Roz Knox.  
 15 Q Okay.  
 16 A The other individuals aren't with the patrol anymore  
 17 that were more involved than anyone else. I don't recall  
 18 whether they would remember this or not.  
 19 Q Okay.  
 20 A Sorry. I can't -- just a question for you: Was this a  
 21 Draeger recommendation that we change that, that we don't  
 22 own it, or was that a patrol recommendation?  
 23 Q I'll tell you what I understand the --  
 24 A That just might help me figure out where to go.  
 25 Q Okay. I'll tell you what I understand the process to

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1 have been. Okay?  
 2 I understand that the Washington State Patrol developed  
 3 technical specifications to be included in the bid for  
 4 contracts. The technical specifications went along with the  
 5 model contract, and the model contract specifically had  
 6 Section 8.5 that said that the State of Washington would own  
 7 the software. Okay?  
 8 I do understand that in the initial technical  
 9 specifications, the patrol took a position that the software  
 10 should be made available pursuant to -- I forgot the exact  
 11 language --  
 12 MR. SULLIVAN: -- for discovery challenges.  
 13 Q -- for discovery challenges.  
 14 MR. SULLIVAN: Discovery and legal challenges.  
 15 Q -- for discovery and legal challenges. Then Draeger  
 16 made a question, or made a request about that language and  
 17 said, "Can you add that it be pursuant to a court order?"  
 18 And the Washington State Patrol then agreed to that, hence  
 19 that would be Exhibit 2, the first solicitation amendment.  
 20 Then Draeger came back and said, "Well, now we  
 21 think" -- "we think there's a conflict between Section 8.5  
 22 and Section 6, so we would like the state patrol now to  
 23 withdraw that section, 8.5, from the model contract."  
 24 So that's what I understand the process to be  
 25 A Okay.

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1 Q That being the background, can you speak to us, then,  
 2 as to why would the State of Washington start and receive a  
 3 contract bid that initially accepted Section 8.5 as it was,  
 4 and then ultimately led for the Washington State Patrol  
 5 withdrawing that section and surrendering their right to own  
 6 the software?  
 7 A I cannot talk to that.  
 8 Q All right. And is there anyone, to your knowledge,  
 9 beside Roz Knox -- I believe K N O X -- that would be able  
 10 to speak to this subject on behalf of the State of  
 11 Washington?  
 12 A I don't know. I mean, if -- I can try and find out,  
 13 but off the top of my head, I -- there's no name that comes  
 14 to mind, apart from DES.  
 15 Q Okay. Do you know why in the technical specifications  
 16 in the original one the Washington State Patrol intended  
 17 language that would limit a defendant's rights? And by that  
 18 I mean this: That language that said the software should be  
 19 made available for discovery and legal challenges, and that  
 20 ultimately led to a contract provision that says "under  
 21 court order"? Can you speak to that?  
 22 A I'm sorry. What was the actual question?  
 23 Q Can you speak as to the reason why the Washington State  
 24 Patrol would want to contract away a defendant's right to  
 25 properly represent themselves in court?

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1 MS. WILLIAMS: Objection as to the form of the  
 2 question. Argumentative.  
 3 The witness may answer.  
 4 A It was not our intent, or we didn't have knowledge at  
 5 the time that, in your words, we would be writing away a  
 6 defendant's right. I can't remember if you said I was  
 7 allowed to guess or not. We --  
 8 Q I would rather you not guess.  
 9 A Right. Well, in terms of -- we -- I'm going to use the  
 10 word "source code," be that as it may. We knew the source  
 11 code was important to us; it was going to be a requirement  
 12 in one way or another based on Florida, based on New Jersey.  
 13 This is a litigious state. We didn't have a stake in this,  
 14 hand over the source code.  
 15 So it may have been a thought at the time that if  
 16 Draeger wanted to put a -- let's say, a restriction on that,  
 17 to say only under a court order, or whatever the wording  
 18 was, it may have been our thought of: We'll agree to that.  
 19 We would not have known the legality of it -- whether that,  
 20 you know, as I said, blew away a defendant's right to that  
 21 Q So that was not the intent of the Washington State  
 22 Patrol?  
 23 A No. If they wanted it under a protective order, as  
 24 long as they agreed or were willing to hand it over  
 25 Q It sounds to me that you would be willing to say, "Let

<p>53</p> <p>1 the defendants have the software so that they can do their 2 business and properly analyze the software in preparation of 3 their defense." 4 A Correct. 5 Q Yeah. Well, I appreciate that, because hearing you 6 talk about this, it seems to me like: Why are we fighting, 7 then? Why don't we just get it and do the analysis? I 8 think it benefits the State; you get to know whether it 9 works or doesn't. I think you think it works, so -- 10 A Well -- 11 Q -- there's no problem, right? 12 A We have certainly done our own internal validation, and 13 we believe it's fit for our purpose and works for our 14 purpose, but -- 15 Q It is true, though, that the State -- the Washington 16 State Patrol has not done a formal analytical analysis of 17 the software akin to what the defense is asking? 18 A Akin to what you're asking, correct. 19 Q In fact, you even wrote an email to the extent, saying 20 that it -- the State of Washington should not do it. 21 A At the time. 22 Q I think your words were, you know, "throwing caution 23 away," you know, "we're not going to do it," correct? 24 A I remember words to that effect. 25 Q Yeah. Can you tell us why the Washington State Patrol</p>	<p>55</p> <p>1 it's good? 2 I mean, there were a lot of reasons. And so at the 3 time it was: We won't do the evaluation. 4 Another reason, which I still think is a legitimate 5 reason: We didn't have the final software at that stage. 6 At the time, we didn't realize how long it would take to get 7 the final software. So had we pursued an evaluation at that 8 time -- and "that time," I'm talking about 2009 -- any 9 software change would we, then, have to do another 10 evaluation and another evaluation, whether that was 11 requested by the prosecution or defense? We just didn't 12 want to be kind of tied of into that: Well, where do we 13 stop with this? 14 An evaluation, now that we have the final software in 15 use, is legitimate. 16 Q Understood. 17 Dr. Couper, I understand that you are scheduled until 18 2:30 because you need to run. Is that still true? 19 A Yes. 20 Q I have so many more questions. You know, so -- but I 21 want to honor your time. And so we are now at 2:25. 22 A Couple of things: I'm going to take a quick break, 23 just to make sure that -- I have one or two more questions 24 to ask; I will do that. But I'll try to wrap it up. 25 The other thing is, there is ongoing litigation in</p>
<p>54</p> <p>1 took the position that they did not want to do an analytical 2 analysis of the software? 3 A Well, this was at the time, too. There were various 4 reasons at the time. I'm trying to remember the exact time 5 frame here. One of the main reasons -- well, there were a 6 lot of reasons. I mean, we thought that the Draeger and its 7 software -- the Draeger, the 9510, was on the NHTSA 8 conforming product list. There was a statement by the 9 National Safety Council saying that review of the 10 software -- I think they use the word "source code," to be 11 specific -- was not relevant to a whole lot of things. 12 We knew that Draeger had, in the past -- I believe with 13 their 7110 -- had gone through some certifications, sort of 14 European certifications to say the software's okay, the 15 instrument's okay. So we relied on that. 16 What I was getting to, we had specifically asked 17 whether the source code evaluation in New Jersey and the 18 source code itself on the 7110, whether it was identical to 19 our source code. And at the start, they had said yes. 20 Later, they changed that. 21 So at the time, we just thought -- and it really wasn't 22 about cost, but then it was like: Well, who pays for that? 23 Should it be the prosecutor? Should it be the Washington 24 Traffic Safety Commission? Should it be us? Should it be 25 Draeger, since it's their software; they should prove that</p>	<p>56</p> <p>1 Snohomish, as you know, and on Monday there is a scheduled 2 hearing. We need to do our due diligence to make sure that, 3 you know, things do not fall through the cracks, so I'm 4 going to serve you with a subpoena today. The State of 5 Washington may or may not withdraw you; I don't know. There 6 might be agreement to move the hearing or not; I don't know. 7 But in an abundance of caution, I have to serve you with a 8 subpoena today. Okay? 9 So I'm going to give that to you now, so you and 10 Shelley, Ms. Williams, can talk about it while my colleagues 11 and I go outside for a few seconds to see if there's 12 anything else that I need to ask you before you go. But I 13 do want to honor the time that you actually gave us. 14 A I'm actually traveling to the East Coast. I'm not 15 here -- I mean, you can serve me. 16 Q Put it on the record: Where are you going to be and 17 when are you leaving and what are you doing? 18 A Well, I was meant to travel tomorrow to the 19 Washington D.C. area, but I changed my flight to Monday 20 I'm at a conference next week. 21 Q Okay. All right. So that is the subpoena for Monday 22 I'll be right back. So excuse me for two seconds. 23 MS. WILLIAMS: Before they go out, I just want 24 to ask you a couple of clarifying questions, in case you 25 guys want to discuss it during your conference.</p>

57	<p>1 EXAMINATION</p> <p>2 BY MS. WILLIAMS:</p> <p>3 Q First of all, Exhibit 3, would you please read the text</p> <p>4 under Question Item No. 13, the entire box?</p> <p>5 A Item No. 13?</p> <p>6 Q Please.</p> <p>7 A "Independent evaluation of software to be provided by</p> <p>8 the manufacturer to the Impaired Driving Section "</p> <p>9 Suggested source code -- in italics. No, whatever</p> <p>10 that's called I'll start that again.</p> <p>11 "Suggested 'source code' software evaluation is costly</p> <p>12 and time consuming. Is there another method of producing</p> <p>13 similar standards?"</p> <p>14 Q And then my next question is, was your understanding of</p> <p>15 what Draeger would produce in terms of source code what was</p> <p>16 produced in the New Jersey and Florida case?</p> <p>17 A I think that's fair to say, yes.</p> <p>18 Q To your knowledge, is there any way the state patrol</p> <p>19 could produce the requested architectural items to the</p> <p>20 defense?</p> <p>21 A The patrol? No.</p> <p>22 MS. WILLIAMS: That's all I have. Thank you</p> <p>23 EXAMINATION</p> <p>24 BY MR. DUARTE.</p> <p>25 Q Do you know what was actually produced in the</p>	59	<p>1 Exhibit 4, titled, "Optional Independent Evaluation of the</p> <p>2 Draeger® Alcotest 9510 Software by the Manufacturer to the</p> <p>3 Impaired Driving Section." Do you see that?</p> <p>4 A Yes.</p> <p>5 Q Now, you do know what this document is, correct?</p> <p>6 A I would have to read it to see whether I knew what it</p> <p>7 was talking about.</p> <p>8 Q Take a look at it, please.</p> <p>9 A Did you want me to just briefly look over this or --</p> <p>10 Q Well, I just want you to confirm a couple of things for</p> <p>11 us.</p> <p>12 A Okay.</p> <p>13 Q First and foremost, is this -- is Exhibit 4 in fact the</p> <p>14 summary that you received from Draeger indicating what their</p> <p>15 optional independent evaluation of the software would've</p> <p>16 been?</p> <p>17 A I'm drawing a blank on this actual document. I would</p> <p>18 have to, again, refer to when I received it. I'm drawing a</p> <p>19 blank on this document.</p> <p>20 Q Right in the middle of the page, for example, it talks</p> <p>21 about the cost for this review would be approximately</p> <p>22 \$78,000?</p> <p>23 A I see that.</p> <p>24 Q Does that comport with your recollection of your</p> <p>25 discussions back in the day about conducting an independent</p>
58	<p>1 New Jersey litigation?</p> <p>2 A I think it's fair to say, no, I don't, just source</p> <p>3 code.</p> <p>4 Q And do you know what, in fact, was produced anywhere</p> <p>5 else in the country pursuant to Draeger litigation?</p> <p>6 A No. Specifically, no.</p> <p>7 MR. DUARTE: Okay. All right. Excuse us,</p> <p>8 Dr. Couper. We'll be really fast. Okay?</p> <p>9 (Break was taken )</p> <p>10 Q (By Mr. Duarte) Dr. Couper, we're going to try to wrap</p> <p>11 it up in five minutes or so. Okay?</p> <p>12 A Okay</p> <p>13 Q Although I understood, maybe erroneously, that you had</p> <p>14 a flight to catch today. Is that still the case?</p> <p>15 A Today? No. Not a flight, no</p> <p>16 Q So it's another engagement --</p> <p>17 A Yes.</p> <p>18 Q -- that you have to attend to?</p> <p>19 MR. DUARTE: May we have this marked as the</p> <p>20 next in order, please.</p> <p>21 Shelley, I don't know if you have this</p> <p>22 MS. WILLIAMS: I have that</p> <p>23 MR. DUARTE: You do?</p> <p>24 (Exhibit No. 4 marked for identification.)</p> <p>25 Q Dr. Couper, I'm showing you what's been marked as</p>	60	<p>1 evaluation and its related costs?</p> <p>2 A Yes. But I mean, off the top of my head, I recall an</p> <p>3 email where the amount of 80,000 was thrown out. I saw</p> <p>4 another email with a much wider range. But, you know, if</p> <p>5 you ask me now, I'm thinking of the email. I'm not thinking</p> <p>6 of this document.</p> <p>7 Q Well, looking at this document, it appears that three</p> <p>8 items below the sentence, "The cost for this review would be</p> <p>9 \$78,000," that it identifies what Draeger was proposing as</p> <p>10 their optional independent evaluation, correct? Do you see</p> <p>11 that?</p> <p>12 A I see that, yes.</p> <p>13 Q Why don't you read those on the record. And as you</p> <p>14 read it, tell us if that comports with your recollection</p> <p>15 about what was being proposed for the independent</p> <p>16 evaluation.</p> <p>17 A The first bullet point.</p> <p>18 Q Yes. All three bullet point, please.</p> <p>19 A I was just referring to this as the first bullet point</p> <p>20 "Auditing and evaluation of the software development</p> <p>21 process."</p> <p>22 Second: "Quality management of software development</p> <p>23 during the development process, on the basis of recognized</p> <p>24 quality standards."</p> <p>25 The third: "Validation and verification of software</p>

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1 products in all phases of their life cycles against the  
 2 requirements of national and international technical  
 3 regulations, conditions laid down in approval procedures and  
 4 specification requirements."  
 5 Q Okay. Does that comport with your understanding of  
 6 what Draeger was proposing to do for their optional  
 7 independent evaluation?  
 8 A Sitting here, I can't recall at the time what they or  
 9 we thought at the time.  
 10 Q Okay. So you might have seen this document before, but  
 11 as you sit here today you don't recall?  
 12 A I don't recall this document.  
 13 Q May I draw your attention to the bottom of page 1 of  
 14 Exhibit 4? And for purposes of moving things along, I want  
 15 to indicate to you the following. It reads. "With respect  
 16 to the Alcotest 9510 source-code [sic], software and  
 17 firmware validation Draeger has been developing this  
 18 software according to the following international  
 19 development standards and is pursuing the following  
 20 validation and compliance certificates." They run from A  
 21 through F.  
 22 Did you receive each and every one of these items, to  
 23 your knowledge? Meaning the State of Washington.  
 24 MS. WILLIAMS: I'm just going to interject  
 25 here. It's 2:35. I suggest Dr. Couper answer this question

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1 and then we call it a day with this interview.  
 2 A Did I, I'm sorry, receive what exactly?  
 3 Q Items A through F. I don't mean you personally, but we  
 4 mean the State of Washington.  
 5 A I was going to say, me personally? No. I'm going  
 6 to - well, to my knowledge, the state patrol have not  
 7 received these items.  
 8 Q Okay.  
 9 A Or had not at the time; "the time" being 2009.  
 10 Q Do you know if they have received it to date?  
 11 A I don't know.  
 12 MR. DUARTE: Okay. All right. Dr. Couper,  
 13 thank you so much for your time.  
 14 THE WITNESS: Okay. You're welcome.  
 15 (Interview concluded at 2:36 p.m.)  
 16 (Exhibit Nos. 1 - 4 attached.)  
 17  
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1 CERTIFICATE  
 2  
 3 I, Brandice L. Pivar, a Certified Court Reporter in and  
 4 for the State of Washington, do hereby certify that I  
 5 reported by stenographic machine shorthand the proceedings  
 6 hereinbefore contained on the subject matter on the date set  
 7 forth, and that the foregoing 62 pages constitute a full,  
 8 true, and correct transcript of said proceedings  
 9 Witness my hand this 24th day of January 2016.  
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 BRANDICE L. PIVAR  
 License No. 3089  
 Certified Court Reporter in and for the  
 State of Washington, residing at  
 Seattle.