NO. 55187-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ENERGY POLICY ADVOCATES,
a Washington nonprofit corporation,

Appellant/Plaintiff,

v.

ATTORNEY GENERAL'S OFFICE,
an agency of Washington State,

Respondent/Defendant.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The purpose of the Public Records Act (PRA) is to provide requesters access to information about the operation of government. The Attorney General's Office (AGO) takes its obligations under the PRA seriously and provides requesters with the fullest assistance under the law. This case presents a narrow and straightforward issue of law: whether internal attorney work-product communications and memoranda, shared only with other AGO attorneys and clients, and containing attorney opinions and mental impressions prepared in anticipation of litigation, are exempt from disclosure under the PRA.

Although the PRA "is a strongly-worded mandate for broad disclosure of public records," *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978), it "specifically exempts work product from disclosure." *Kittitas Cty. v. Allphin*, 190 Wn.2d 691, 715, 416 P.3d 1232 (2018), as amended (June 18, 2018). In producing records to appellant Energy Policy Advocates, the AGO redacted certain portions of communications and memoranda. These portions were properly withheld as work product under RCW 42.56.290, as the superior court concluded after examining the unredacted records in camera. Appellant's claim that the superior court's order lacked sufficient detail is both erroneous and a red herring: this Court reviews the question of whether redactions were properly

applied under the PRA de novo. Under that standard, the law is clear that the work product doctrine applies to the records partially withheld by the AGO, and this Court should therefore affirm the superior court's ruling.

II. COUNTERSTATEMENT OF THE ISSUES

Whether, in producing records under the Public Records Act, the AGO properly redacted attorneys' mental impressions and opinions about potential litigation under the work product doctrine?

III. STATEMENT OF THE CASE

On May 6, 2019, the AGO received a public records request from Matthew Hardin on behalf of Energy Policy Advocates (EPA). CP 35-54. EPA, through Mr. Hardin, sought all correspondence "…sent to, from, cc: or bcc:, Laura Watson and/or Bill Sherman, which also includes, anywhere,"Pawa" and/or "Oreskes", including, but not limited to, email addresses, e.g., mp@pawalaw.com or oreskes@fas.havard.edu" between the dates of January 1, 2016 through April 30, 2016. CP 35-54.

On June 28, 2019, AGO public records officer Emily Kok produced to EPA, via Mr. Hardin, an initial 30 pages of responsive records, termed Batch 1. CP 35-54. Batch #1 consists of a single 30 page record. CP 32-34. It is an email sent by Senior Assistant Attorney General Shannon Smith (Smith Email) to which two other emails are attached. CP 32-34. The Smith Email, on page 1 of the 30 page record (MH 00001), was sent from Division

Chief Shannon Smith to then Division Chief Laura Watson and Assistant Attorney General Leslie Seffern. CP 63-65. A short paragraph written by Smith was redacted because it explains the subject of anticipated or potential litigation discussed in the litigation memos. CP 63-65. The email below Smith's email in the email string, on page 1 of the 30 page record (MH 00001), is an email from Watson to five AGO attorneys in which one sentence is redacted because it concerns the anticipated or potential litigation discussed in the litigation memos. CP 63-65.

The emails in this string are internal to AGO employees and include a primary litigation memo addressed to Deputy Attorney General Rob Costello, to which three additional litigation memos are attached. CP 63-65. The confidential primary litigation memo and the three litigation memo attachments were all prepared by AGO attorneys. CP 63-65. The primary litigation memo is an overview and summary of legal theories and litigation strategy for a potential lawsuit that could be filed by Washington State. CP 63-65. Each of the attached litigation memos were prepared by attorneys with expertise in specific legal subjects and provide more detailed research and explanation of the legal theories summarized in the primary litigation memo. CP 63-65. The litigation memos detail the factual background, summaries, and analysis of various laws, regulations, and case law regarding potential or anticipated litigation, as well as various options and

strategies. CP 32-34. This record was responsive to the request because the term "Pawa" appears one time in the litigation memorandum sent to Costello. CP 32-34.

On July 16, 2019, Ms. Kok produced to EPA, via Mr. Hardin, a second batch of approximately 44 pages of records, termed Batch 2. CP 35-54. Batch 2 consisted of emails between attorneys and clients, all of which were largely unredacted. CP 32-34. Many of the email threads were duplicative. CP 32-34. These emails were responsive to the request because the terms "Pawa" or "Oreskes" appeared in them. CP 32-34. The portions of the emails containing these terms were not redacted. CP 32-34. The specific portions of various emails in Batch 2 that were redacted contain attorney-client communications or attorney impressions regarding interest in, possibility of, or strategy for potential litigation. CP 32-34.

In both Batch 1 and Batch 2, the portion of the records that contain redactions were communications among AGO employees or with state client representatives related to potential litigation. CP 63-65. EPA knows this because the AGO did not redact the identities of those sending or receiving these communications. CP 63-65.

Each instance of information redacted from the produced records as work product was marked with a code. CP 35-54. These codes are references to a document entitled List of Public Records Exemptions

Commonly Applicable to AGO Records that gives codes corresponding to various statutory exemptions, as well as providing a brief explanation of the exemptions. CP 35-54. This document was provided with the records. The redaction codes used in the produced records here were 2a, 2c, and 2d, which are all codes related to the work product privilege, exempt pursuant to RCW 42.56.290.[1] CP 35-54.

On August 2, 2019, Ms. Kok sent a letter to Mr. Hardin informing him that no additional responsive records had been located and thus, the request was now closed. CP 35-54.

EPA, nor Mr. Hardin on behalf of EPA, initiated no further communication regarding its request until February 20, 2020, when EPA served the Complaint in this action on the AGO, challenging the redactions. CP 35-54.

Thurston County Superior Court Judge Price presided over the

[1] Work Product Privilege code 2a explains the record is: Drafts, notes, memoranda, or research reflecting the opinions or mental impressions of an attorney or attorney's agent prepared, collected, or assembled in litigation or in anticipation of litigation.

Work Product Privilege code 2c explains the record is: Communication between attorney and client that reveals opinions or mental impression of attorney, or information prepared, collected, or assembled in litigation or in anticipation of litigation.

Work Product Privilege code 2d explains the record is: Communication between attorneys that reveals opinions or mental impression of attorney, or information prepared, collected, or assembled in litigation or in anticipation of litigation.

matter. A hearing was conducted via affidavit pursuant to RCW 42.56.550(3) (allowing courts to conduct PRA hearings solely on affidavit). The court reviewed all pleadings, heard arguments, and conducted an in camera review of the unredacted versions of the records at issue. CP 75-77, 196-198. Following its "detailed review" of the records, the court determined that all redactions were reasonably characterized as work product. CP 196-198. It thus dismissed EPA's complaint, concluding that the AGO's redactions comported with the PRA. CP 196-198. The court ordered that "the unredacted versions of the documents reviewed in camera … will remain under seal and available for appellate review." CP 196-198.

IV. STANDARD OF REVIEW

"Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo." RCW 42.56.550(3); *Progressive Animal Welfare Soc'y v. Univ. of Wash*., 125 Wn.2d 243, 252, 884 P.2d 592 (1994). This Court will review de novo "[a]gency action taken or challenged under the PRA." *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 428, 327 P.3d 600 (2013), *as amended on denial of reh'g* (Jan. 10, 2014).

V. ARGUMENT

A. Because this Court reviews a PRA claim de novo, EPA's challenge to the level of detail contained in the superior court's order is unavailing.

EPA devotes much of its brief to attacking the superior court's order as insufficiently detailed. Appellant's Br. at 5-8. As an initial matter, contrary to EPA's contention, the superior court's order was sufficient because findings of fact and conclusions of law are not necessary when a case is decided solely on an issue of law, including cases decided on a motion to dismiss under Rule 12, a motion for summary judgment under Rule 56, "or, unless these rules provide otherwise, on any other motion." CR 52; Decisions, Findings and Conclusions, 4 Wash. Prac., Rules Practice CR 52 (6th ed.). This matter was decided solely on an issue of law in a merits hearing conducted via affidavit (similar to summary judgment) pursuant to RCW 42.56.550(3).

Here, the sole issue before the superior court was whether the AGO properly applied the work product privilege to redact certain portions of records. The hearing was conducted via affidavit. The parties did not dispute any material facts, and the superior court reviewed the records at issue. Thus, whether the work product privilege applies to those records is an issue of law. No findings of fact or conclusions of law were required.

In any event, the standard of review applicable to agency actions challenged under the PRA renders the sufficiency of the superior court's order irrelevant. As this Court has held in the context of PRA challenges, "[b]ecause we review the challenged order de novo, the trial court's findings

of fact and conclusions of law are superfluous." *Chen v. City of Medina*, 179 Wn. App. 1026 (2014).[2] And it is well established that an appellate court conducts a de novo review of a challenged agency response to a PRA request. *Wright v. State*, 176 Wn. App. 585, 309 P.3d 662 (2013); *Resident Action Council*, 177 Wn.2d at 428; *Kittitas Cty. v. Allphin*, 190 Wn.2d 691, 700-01, 416 P.3d 1232 (2018), *as amended* (June 18, 2018) (conducting de novo review of question of whether emails exchanged between county and state agency constituted work product).

In sum, the superior court was not required to issue findings and conclusions on this issue of law, and in any event, because this Court reviews the application of a PRA exemption de novo, the level of detail contained in the superior court's analysis does not provide a basis for this Court to reverse the superior court's judgment.

B. The AGO Properly Redacted Work Product Privileged Information.

The PRA provides a broad mandate for liberal disclosure of public records. RCW 42.56.030. Under the PRA, "[a]n agency must disclose responsive public records 'unless the record falls within the specific exemptions of [the PRA] . . . or other statute.' " *Allphin*, 190 Wn.2d at 701

[2] This unpublished opinion is cited pursuant to General Rule 14.1(a) as a nonbinding authority, and may be accorded such persuasive value as the court deems appropriate.

(quoting RCW 42.56.070(1)). "But where a listed exemption squarely applies, disclosure is not appropriate." *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007).

RCW 42.56.290, commonly referred to as the "controversy exception," exempts "[r]ecords that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts . . . from disclosure under this chapter." Simply put, "[a]ny materials that would not be discoverable in the context of a controversy under the civil rules of pretrial discovery are also exempt from public disclosure under RCW 42.56.290." *Soter v. Cowles Pub. Co*., 162 Wn.2d 716, 731, 174 P.3d 60, 76 (2007).

Under the rules of pretrial discovery, and therefore under the PRA, an attorney's work product is exempt from discovery. "[T]he work product doctrine allows attorneys to have complete privacy to assess the strengths and weaknesses of a case, . . . to plan litigation strategy and [to] share impressions[.]" *Richardson v. Gov't Employees Ins. Co.*, 200 Wn. App. 705, 716, 403 P.3d 115 (2017), *review denied*, 190 Wn.2d 1008, 414 P.3d 575 (2018) (emphasis added). The work product doctrine is designed to protect the efforts of an attorney and those who assist attorneys from disclosure to a litigation adversary. *Allphin*, 190 Wn.2d at 709. The work product

exemption applies to "completed, existing, or reasonably anticipated litigation." *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993). "RCW 42.56.290's protection is triggered prior to the official initiation of litigation and extends beyond the official termination of litigation." *Soter*, 162 Wn.2d at 732 (quotation omitted).

1. The redacted records were created in anticipation of litigation

Here, the litigation memoranda were properly redacted as work product because they were created in anticipation of litigation. Each of the memoranda contains detailed factual backgrounds, summaries, and analysis of various statutes, regulations, and case law, as well as assessments of the strengths and weaknesses of a case and various options and strategies for potential litigation. CP 32-34. These memoranda were explicitly designated by their senders and authors as confidential and privileged. CP 32-34.

In addition to the memoranda themselves, certain emails and portions of emails were also properly redacted as work product. The redacted portions of emails in Batch 1 consist of communications between attorneys about the memoranda and the potential litigation. CP 32-34. The emails in Batch 2, which consist of communications between and among attorneys and clients, are largely unredacted. CP 32-34. The redacted portions of the Batch 2 emails—many of which are duplicative, because

identical versions of the same emails appear multiple times in the produced records—are communications containing attorney impressions and strategies regarding potential litigation. CP 32-34.

The redactions were precise and applied to material pertaining to the mental impressions and strategies of attorneys discussing anticipated litigation. The redacted material was thus work product within the meaning of RCW 42.56.290 and CR 26(b)(4). *See Soter*, 162 Wn.2d at 733 (concluding that documents created by legal team in anticipation of litigation were properly withheld as work product under the PRA).

2. The documents are not discoverable under CR 26(b)(4)

The standards for applying the controversy exemption to the PRA are identical to the familiar "standard[s] for determining whether records would be discoverable in superior court" under CR 26. *Kittitas Cty. v. Allphin*, 190 Wn.2d 691, 701, 416 P.3d 1232 (2018), as amended (June 18, 2018); *see also Limstrom v. Ladenburg*, 136 Wn.2d 595, 605, 963 P.2d 869 (1998) ("The exemption relies on the rules of pretrial discovery to define the parameters of the work product rule for purposes of applying the exemption.").

The records EPA seeks in this case are not discoverable under CR 26(b)(4), and therefore are exempt from disclosure. CR 26(b)(4) provides:

[A] party may obtain discovery of documents and tangible

> things . . . prepared in anticipation of litigation . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The Washington Supreme Court has developed a taxonomy of "specific guidelines regarding when an attorney's work product is discoverable":

> (1) The mental impressions of the attorney and other representatives of a party are absolutely protected, unless their mental impressions are directly at issue. *Pappas v. Holloway*, 114 Wn.2d 198, 212, 787 P.2d 30 (1990).
>
> (2) The notes or memoranda prepared by the attorney from oral communications should be absolutely protected, unless the attorney's mental impressions are directly at issue. *See Pappas*, 114 Wn.2d at 212 [787 P.2d 30]; *Dever v. Fowler*, 63 Wn. App. 35, 48, 816 P.2d 1237 (1991).
>
> (3) The factual written statements and other tangible items gathered by the attorney and other representatives of a party are subject to disclosure only upon a showing that the party seeking disclosure of the documents actually has substantial need of the materials and that the party is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. Mental impressions of the attorney and other representatives embedded in factual statements should be redacted. *Heidebrink [v. Moriwaki*], 104 Wn.2d 392[, 706 P.2d 212 (1985)].

Allphin, 190 Wn.2d at 704 (alterations in original) (quoting *Limstrom*, 136

Wn.2d at 611–12) (internal quotation marks omitted).

The emails and memoranda in this case fall under the first category of work product. As in *Allphin*, "all the e-mails were created in anticipation of litigation and reflect attorney opinions, thoughts, and conclusions about the litigation." *Id*. at 706. They include discussion of "legal research and opinions, mental impressions, theories, [and] conclusions of the attorney[s]," *Limstrom*, 136 Wn.2d at 611, "litigation-related technical, factual, and regulatory issues," *Allphin*, 190 Wn.2d at 706, and litigation strategy. As such, the emails and memoranda are "absolutely protected" from disclosure under the PRA. *Id*. at 704 (citing *Pappas*, 114 Wn.2d at 212). Pursuant to the work product doctrine, the AGO carefully redacted various attorney impressions regarding interest in, possibility of, or strategy for potential litigation. *See* CP 32-34.

The redacted portions of the produced records contain mental impressions and strategies of attorneys discussing and contemplating potential litigation. Thus, the information is exempt from disclosure pursuant to the work product privilege.

C. There is no evidence that the work product privilege was waived.

A party only waives its work product privilege when "'the client, the client's lawyer, or another authorized agent of the client ... discloses the

material to third persons in circumstances in which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it.'" *Washington Coal. for Open Gov't v. Pierce Cty.*, 50718-8-II, 2019 WL 761585, at 6, *review denied*, 193 Wn.2d 1020, 448 P.3d 66 (2019) (quoting *Allphin*, 190 Wn.2d at 710).

As it did below, EPA speculates, without any supporting evidence, that the work product privilege may have been waived if the records were shared outside the AGO. However, there is no evidence that any of the records were shared outside the AGO and its clients, much less that they were shared in a way that would create "a significant likelihood that an adversary or potential adversary in anticipated litigation" would obtain them. *Allphin*, 190 Wn.2d at 712. Therefore, there is no evidence of waiver. In both Batch 1 and Batch 2, the portion of the records containing redactions were communications among AGO employees or with state client representatives related to potential litigation. CP 63-65. EPA knows this because the AGO did not redact the identities of those sending or receiving these communications. CP 63-65.

Moreover, the litigation memoranda were prepared by attorneys within the AGO regarding potential or anticipated litigation, for internal use and discussion only. CP 63-65. These memoranda were explicitly designated by their senders and authors as confidential and privileged

communications, which EPA knows because the confidentiality designations were not redacted. CP 63-65. The emails distributing the litigation memoranda were sent only to people within the AGO. CP 63-65. The litigation memoranda were prepared for internal use only and were not shared externally. There is no evidence of any waiver of the work product privilege.

VI. CONCLUSION

In producing documents to EPA, the AGO complied with the PRA by properly redacting information protected from disclosure under the work product doctrine. This Court should affirm the superior court's order.

RESPECTFULLY SUBMITTED this 1st day of February, 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at the Office of the Attorney General, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed parties of record by the methods noted:

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DATED this 1st day of February 2021, at Seattle, Washington.

s/ Jennifer Steele
JENNIFER S. STEELE
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