

**PUBLIC RECORDS: THE
ATTORNEY-CLIENT PRIVILEGE
AND WORK PRODUCT DOCTRINE**

Guidance on Recurring Issues

December 1, 2004

I. INTRODUCTION

This guidance is provided to address recurring questions about the attorney-client privilege and how it applies to documents that may be the subject of a public records request. The issue of the application of the attorney-client privilege as an exemption from disclosure has received significant attention following the Washington Supreme Court's decision in *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004), including concern that governments would be able to withhold more documents than in the past. However, the *Hangartner* decision does not represent an expansion of public records exemptions as those exemptions have been understood by the Attorney General's Office. The Public Records Act has been viewed historically as exempting documents that fall within the parameters of the privilege.

It is important to recognize that the attorney-client privilege has limited and defined parameters. The privilege does not permit a public agency to withhold a document merely because it has come into the possession of a lawyer or because a lawyer was present when notes were taken. The privilege applies only where the document reflects (1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of obtaining or providing legal assistance for the client. These principles were emphasized in the Court's opinion in *Hangartner v. City of Seattle*:

The attorney-client privilege is a narrow privilege and protects only 'communications and advice between attorney and client;' it does not protect documents that are prepared for some other purpose than communicating with an attorney. *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 421, 635 P.2d 708 (1981). Thus, should an agency

prepare a document for a purpose other than communicating with its attorney, and then claim that the document is protected by the attorney-client privilege, the requesting party might well claim that the agency has acted in bad faith.

Hangartner, 151 Wn.2d at 452.

II. SCOPE OF THE GUIDANCE

This guidance addresses principles of attorney-client privilege and the work product doctrine and how they generally apply to certain types of documents. There may be specific circumstances that need to be considered in reviewing a request for a particular record, and records officers should consult with legal counsel about whether a particular document is exempt from disclosure because of the attorney-client privilege or work product doctrine. This guidance addresses only the attorney-client privilege and the work product doctrine. It does not address whether a document is subject to other exemptions in the public records law. A determination of whether another exemption applies requires analysis of the scope of the particular exemption.

III. RECURRING ISSUES

A. When does the attorney-client privilege apply?

In state and local government, the privilege applies when government employees or officials and legal counsel consult in confidence for the purpose of obtaining or providing legal advice or assistance. This privilege protects both the provision of information to the lawyer to enable him or her to give informed advice, and the professional legal advice provided by the lawyer. The attorney-client privilege can arise only in circumstances where there is a reasonable expectation of confidentiality. Thus, documents shared in a public forum would not be privileged even if they contained legal analysis.

B. Are agencies entitled to withhold a greater number of documents as the result of the *Hangartner* opinion?

No. The *Hangartner* decision reaffirmed the understanding of state and local governments that there is a public records exemption for attorney-client privileged

documents. It did not expand the scope of that privilege. Indeed, as noted above, the Court's opinion emphasizes that the privilege is narrow and applies only to documents that meet the specified criteria.

C. What are the consequences of withholding records from disclosure if the privilege does not apply?

Unlawful failure to produce requested public records may result in substantial court-imposed penalties from a minimum of five to a maximum of one hundred dollars per day, plus reasonable attorneys' fees. Since the statute of limitations allows the requester five years to bring a lawsuit and the penalties could continue to accrue until a court decision, an unfounded claim of attorney-client privilege could lead to penalties and fees of over \$200,000. Therefore, withholding documents from disclosure based on an overbroad interpretation of the attorney-client privilege could result in severe financial consequences to the agency. To comply with the law and to avoid such consequences, public records officers should consult with legal counsel to make sure they are not asserting the attorney-client privilege when it is not warranted.

D. Can a memorandum or e-mail message from one non-lawyer to another be deemed privileged simply because legal counsel is listed as a "cc" recipient?

No. If the memorandum or e-mail message is sent for purposes other than obtaining or providing legal advice, it is not within the scope of the privilege. For example, an e-mail is not privileged where the lawyer is copied in order to keep the lawyer apprised of what an agency is doing in its usual business functions. In unusual circumstances an e-mail or memorandum will be "cc'd" rather than addressed to the lawyer, yet will include a request for legal advice, will share legal advice that has been given with other employees, or will constitute "work product" as described in sections O and P below. These portions would be privileged and should be redacted. However, a communication that is otherwise non-privileged but which includes a "cc" to an attorney would appear intended simply to keep the lawyer in the loop on ordinary agency business other than obtaining legal advice, and would not be privileged.

E. If an agency sends documents that are not privileged to legal counsel, do those documents become privileged?

No. The privilege does not apply to documents that were originally composed for purposes other than seeking legal advice, even if they are sent to legal counsel either at the time they are written or later. For example, in most circumstances, sending copies of agency documents to legal counsel to keep the lawyer apprised of actions taken by the agency in the usual course of its business would not make the documents privileged. In some circumstances, the client may seek legal advice about the documents. While the privilege might apply to separate memos or e-mails in which the client sought legal advice about the documents, it would not apply to attached documents that were prepared for purposes other than seeking legal advice.

F. Are draft documents that are sent to legal counsel for comment privileged?

When a client prepares and sends a lawyer a “draft” of a document for the purpose of seeking legal advice or assistance, the draft that is sent and counsel’s recommended changes or comments are usually privileged. Courts generally regard such exchanges of drafts between clients and legal counsel as communications for the purpose of providing legal advice. However, if drafts are separately circulated to other agency staff for purposes other than obtaining or conveying legal advice, those drafts would not be exempt under the attorney-client privilege.

G. Are minutes or notes of a meeting where legal counsel is present privileged?

The mere fact that legal counsel is present at a meeting does not shield otherwise unprivileged documents from disclosure. Whether the meeting minutes or notes are privileged depends on the nature of the discussion that is memorialized. If the meeting minutes or notes reflect conversations that were for the purpose of obtaining or providing legal advice, those portions would be privileged. Conversely, portions of the minutes or notes that reflect discussions that were not for the purpose of obtaining or providing legal advice would not be privileged. In some situations lawyers attend meetings so they will be kept apprised of what the agency is doing or to be available if legal issues were to arise. But only documents

reflecting those portions of the meeting that involved confidential communications to identify legal issues and obtain legal assistance or advice would be privileged.

H. What records are produced if only a portion of a meeting deals with legal advice being requested or provided?

The fact that a portion of a meeting involves legal advice being requested or received does not mean that everything said at the meeting or written about it is privileged. The appropriate response is to redact the privileged portions of the minutes and notes and produce the remaining unprivileged portions of the documents.

I. Can meeting notes or minutes fall within this privilege if a lawyer is not present?

Yes, but only in specific and limited circumstances. The privilege may apply where (1) the communications among agency employees or officers are for the purpose of gathering information to provide to legal counsel in order to obtain legal advice or assistance, or (2) where the communications are to advise agency employees or officers of legal advice that has been given so they can properly carry out their duties.

J. What if the communication is with an investigator or paralegal who works with the lawyer?

Legal counsel may use assistants, such as paralegals or investigators, to facilitate communication—the privilege extends to communications with the lawyer’s assistants in the same manner as it would to communications with the lawyer (i.e., if the communication is for the purpose of soliciting or giving legal advice it is privileged, and if the communication is for some other purpose the privilege does not apply). Such communications may also fall within the work product doctrine, described in Sections O and P below.

K. Are investigation reports prepared by a lawyer privileged just because a lawyer is involved?

No. The mere fact that a lawyer produced a report is not sufficient to bring it under the protection of the attorney-client privilege. Whether an investigation report prepared by a lawyer is exempt under the attorney-client privilege depends on whether the lawyer was acting as an investigator or as a legal advisor. The

privilege is inapplicable if the investigation was for a purpose other than to facilitate legal advice or services, even if it is performed by a lawyer. However, the privilege is applicable if the lawyer talked to third parties and reviewed documents for the purpose of obtaining the facts necessary to provide informed legal advice and legal services. Whether a privilege exists in a particular investigative situation is a very fact-specific inquiry, and public records officers should consult with their legal counsel in assessing individual situations.

The work product doctrine discussed in Sections O and P below applies to materials prepared in anticipation of litigation. If an investigation report was prepared for litigation purposes, by lawyers or in some cases by non-lawyers, it could be exempt under the work product doctrine.

L. Does the attorney-client privilege apply to communications with lawyers who work for Washington state agencies other than the Attorney General's Office?

An attorney-client privilege usually will not exist between in-house employees of a state agency, even if one is a lawyer. Within Washington state government, with few exceptions, only assistant attorneys general are authorized to provide legal advice to a state agency in an attorney-client relationship. Employees of a state agency who are lawyers but are not appointed as special assistant attorneys general usually will not have an attorney-client relationship with the agency. In the rare circumstances where state law authorizes employment of legal counsel other than the Attorney General's Office, communications between agency personnel and such counsel are governed by the same considerations outlined in this guidance.

However, a privilege may apply, just as it would for non-lawyer employees of the agency, if the communications with the agency employee who is a lawyer were for the purpose of obtaining legal advice from assistant attorneys general or relaying the legal advice to employees of the client. For example, state agencies will often hire lawyers in positions as risk managers or legal affairs liaisons, and their communications to facilitate obtaining legal advice from the Attorney General's Office or conveying that advice back to the employees of the client may fall within the attorney-client privilege.

M. What criteria do we look for to determine if the attorney-client privilege may apply to a document?

For the privilege to apply, the document generally must fall within one of the following types of confidential communications:

- Communications to legal counsel from agents or employees of the organization who have authority over the subject matter of the communication for the purpose of obtaining legal advice or assistance.
- Communications to legal counsel from other individuals within the organization from whom the lawyer gathers information in order to give the organization informed legal advice or assistance.
- Communications among employees or officers of an organization to gather information to provide to legal counsel in order to obtain legal advice or assistance.
- Communications from legal counsel to agents or employees of the organization in which legal advice or assistance is provided.
- Communications within an organization advising other members of the organization of the legal advice given to enable them to properly carry out their duties.
- Communications among lawyers who are co-counsel for the same client.
- Communications among lawyers for different clients, where the clients share certain common interests, under a “common interest” agreement or a “joint defense” or “joint prosecution” agreement. The “common interest” doctrine allows a lawyer to share thoughts and materials with another lawyer whose client has common interests with the lawyer’s own client. For instance, state enforcement agencies may have a common interest agreement with enforcement agencies in other states when coordinating investigations, such that a document sent by the Attorney General’s office of another state may fall within such an agreement. The applicable privileges are not waived by sharing documents with other parties to such agreements. The agreement may be, but will not always be, in written form.

N. Does the attorney-client privilege continue after a case is concluded and the advice has been given?

Yes, if the criteria described above are met and the client has not waived the privilege.

O. What is the work product doctrine?

Attorney work product consists of materials prepared, collected or assembled by a lawyer or the lawyer's agents, or in some instances by the client for the lawyer's use, for litigation then in progress or in reasonable anticipation of future litigation. Work product falls within RCW 42.17.310(1)(j), which exempts documents that "are relevant to a controversy" and that "would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts."

This exemption does not apply just because litigation may someday ensue. Public records officers should consult with their legal counsel on whether a document was prepared "in reasonable anticipation of future litigation" to prevent claims of the work product that are not warranted.

P. What types of documents fall within the work product doctrine?

The work product doctrine generally applies to documents prepared in anticipation of litigation, and may apply to documents prepared by either lawyers or non-lawyers. General categories of work product include:

- Documents reflecting the opinions or mental impressions of a lawyer or the lawyer's agent (such as research, drafts, notes, or legal memoranda).
- Other documents prepared or collected by the lawyer or lawyer's agent, or in some instances the client (such as witness interviews or statements).
- Documents collected or assembled by a lawyer but not prepared by the lawyer when disclosure would reveal the mental impressions or legal opinions inherent in the process of selection or arrangement (such as a compilation of cases).

Q. If an agency's files contain legal pleadings that have been filed with the court, are those documents subject to disclosure?

Yes, as a general matter. If the copies contained in the agency files are documents that would be available from the court clerk, then they are public documents and should be produced. However, some legal filings or specific information within those filings may be subject to confidentiality laws or protective orders entered by the court. Public records officers should confer with legal counsel to determine whether any confidentiality laws or protective orders apply to the particular legal pleading that has been requested.

If the document contains highlighting or notes, those markings may be work product that should be redacted before the documents are disclosed.

R. Does the application of the work product exemption depend on the status of the litigation as "open" or "closed"?

No. The work product doctrine continues to protect materials prepared in anticipation of or during the course of litigation, even after the litigation has terminated. This rule reflects the fact that there may be ongoing reasons to protect the information, since it may be used by an adversary in similar types of cases or in future related legal proceedings (which could arise many years in the future).

S. If a requester disagrees with assertions of attorney-client privilege or work product exemption, are there processes for review?

The Public Records Act requires agencies to provide a process for in-house review of decisions denying requests for public records. In addition, when a state agency denies access to a public record and cites to an exemption from public disclosure, the Attorney General has the authority to review the agency's denial under RCW 42.17.325. Upon request, the Attorney General's Office may provide a non-binding written opinion on whether the record is exempt from public disclosure. This review provides citizens the opportunity to obtain a second, independent review of their public records requests without going to court.