



Rob McKenna  
**ATTORNEY GENERAL OF WASHINGTON**  
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

November 14, 2008

Mr. Thomas Carr  
City of Seattle Attorney's Office  
PO Box 94769  
Seattle, WA 98124-4769

**RE: Attorney General's Proposal to Sunshine Committee Regarding Attorney-Client Privilege and Attorney Work Product**

Dear Mr. Carr:

Enclosed is the proposal that I submitted to the Public Records Exemptions Accountability Committee regarding the attorney-client privilege and attorney work product. Though this did not come to a vote by the Committee, I request that it be included in the November report of the Committee to the Legislature as an alternative for consideration by the Legislature.

In my opinion, this proposal has a number of advantages over the other proposals that were submitted to the Committee for consideration.

First, it contains specific legislative language that would clarify the state of the law. The proposal that was adopted by the Committee does not contain such specific language.

Second, it addresses the primary issues of concern that were presented to the Committee. During the course of the public hearings on attorney-client and attorney work product issues, the Committee heard testimony about misunderstanding or misapplication of the law. We heard concerns about agency staff copying attorneys on memoranda or using of attorneys to conduct investigations for the purpose of avoiding the disclosure of public records. This proposal would clarify that such practices cannot be used to avoid disclosure.

Finally, though there is a substantial body of case law applying the attorney-client privilege and the work product doctrine, agencies should not have to use (and pay) their lawyers to interpret that case law whenever there are requests for records that are written to or from attorneys in order to determine whether they are covered by the attorney-client privilege or constitute attorney work product. Codifying the law on these issues should make it easier for agency public records officers to respond to public records requests in a lawful and efficient manner.

Sincerely,

TIMOTHY D. FORD  
Open Government Ombudsman

TDF/eg



Rob McKenna

# ATTORNEY GENERAL OF WASHINGTON

1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

October 3, 2008

Public Records Exemptions Accountability Committee  
PO Box 40100  
Olympia, WA 98504

**RE: Attorney-Client Privilege and Attorney Work Product Exemptions**

Dear Chairman Carr and Committee Members:

Enclosed for consideration at the next meeting of the "Sunshine Committee" is a proposal relating to attorney-client privilege and attorney work product exemptions. It is designed to curb potential abuses of these exemptions by making clear that they do not apply when an agency involves an attorney for the purpose of avoiding disclosure of otherwise disclosable documents.

At our meeting on October 14, 2008, I intend to offer this proposal for discussion, and possible adoption, by the Committee.

Sincerely,

TIM FORD  
Assistant Attorney General

TDF:df  
Enclosure

**Draft Proposal on Attorney-Client Privilege and Attorney Work Product Exemptions**  
**Public Records Exemptions Accountability Committee**  
**Tim Ford**  
**October 3, 2008**

The following draft legislation is intended to clarify the scope of the attorney-client and work product exemptions under the Public Records Act by making clear that they do not apply when an agency involves an attorney for the purpose of avoiding disclosure of otherwise disclosable documents under the Act.

AN ACT Relating to public disclosure; amending RCW 42.56.290, and adding a new section to chapter 42.56 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. A new section is added to chapter 42.56 RCW to read as follows:

(1) Records reflecting communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties and an attorney serving in the capacity of legal advisor for the purpose of rendering or obtaining legal advice, and records prepared by the attorney or a public official in furtherance of the request for or rendition of legal advice, are exempt from disclosure under this chapter.

(2) Records are not exempt from disclosure under this section merely because they reflect communications in meetings where legal counsel was present or because a record or copy of a record was provided to legal counsel, if the elements of subsection (1) of this section are not met.

(3) This section governs exemption of records from the provisions of this chapter based on the attorney-client privilege as applied to public agencies and public officials in their official capacities

Sec. 2. RCW 42.56.290 is amended to read:

(1) Records 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 are exempt from disclosure under this chapter.

(2)(a) For purposes of this section, work product is exempt from disclosure to the same extent as it would be protected under CR 26(b)(4) of the Washington Civil Rules of Procedure.

(b) A party who disagrees with the assertion of work product may request an in-camera hearing. If the party contesting the assertion of work product demonstrates that the agency involved the attorney not for the purpose of benefiting from the attorney's professional judgment in representing the agency, but to prevent public disclosure of the document or portion of the document, the court shall order the document or portion of document released.