

NO. 42331-6

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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ARTHUR WEST,

Appellant,

v.

WASHINGTON STATE BOARD OF ACCOUNTANCY,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

The Washington State Board of Accountancy (Board) regulates the practice of public accountancy in Washington. In the course of carrying out this responsibility, the Board receives, investigates, and determines the appropriate disposition of complaints regarding licensees' professional misconduct.

Appellant Arthur West, pursuant to the Public Records Act, chapter 42.56 RCW ("PRA" or "the Act"), requested Board records of consulting expert and staff deliberations on case prosecution strategy that the Board had previously denied another requestor. The Board gave Mr. West the fullest assistance possible in inspecting the records and fully complied with the PRA. It properly claimed exemptions for portions of disciplinary case files based on the PRA's work product exemption, also cited the deliberative process exemption, and provided an exemption log.

Mr. West brought this action seeking judicial review of the Board's claims of exemption. The superior court properly found that the Board's claims of exemption were appropriate and that the Board did not violate the PRA, and dismissed this action.

All that is necessary to resolve this case is for the Court to decide whether the narrow set of records at issue are protected work product. The Board requests that this Court affirm the superior court's order of dismissal.

## II. COUNTERSTATEMENT OF THE ISSUES

- A. Under RCW 42.56.290, which exempts from disclosure, under the PRA, records that are related to a controversy to which an agency is a party and that would not be subject to pretrial discovery, did the Board properly withhold or redact communications discussing prosecution strategy for specific disciplinary cases?
- B. Are records that are protected as work product in this case also exempt under RCW 42.56.280 as preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated?

## III. STATEMENT OF THE CASE

A. Mr. West's public records request.

The Board office received a document from Mr. West on June 22, 2010. Declaration of Richard C. Sweeney (Sweeney Decl.) CP 57, ¶ 2; CP 61-62. The document was a copy of letter from a previous public records requester with some lines crossed off and additional text written in, presumably in Mr. West's handwriting. The handwritten notations read, in part, "seeking inspection under RCW 42.56 of the undisclosed records in the Public Records Act lawsuit against the [Board]" and "unredacted copies of the records produced for in camera review in Clark v. Board of Accountancy." *Id.* Board staff interpreted the handwritten notes as references to a PRA lawsuit against the Board, *Clark v. Bd. of Accountancy*, Thurston County Cause No. 08-2-00890-5. The *Clark* lawsuit, which involved numerous public records requests, had been settled in 2009. The records at issue in this case were never adjudicated in the *Clark* matter, having been lodged with the court for an in camera

review that was still pending at the time the *Clark* case settled. Sweeney Decl., CP 57, ¶ 2. The document from Mr. West was processed as a public records request for those records.

Mr. West's request was acknowledged within five business days, as required under the PRA, by a letter dated June 28, 2010, offering several possible times between June 30 and July 8, 2010 for an appointment to view the records. The Board's Public Records Officer, Richard C. Sweeney, who also serves as its Executive Director, confirmed an appointment with Mr. West by letter dated June 30, 2010, to facilitate his request for inspection of "unredacted copies of the records produced for in camera review in *Clark v. Board of Accountancy*." The letter explained that "unredacted copies" were not available for Mr. West's inspection because portions of the records were exempt from disclosure, as would be explained in exemption logs. It stated the Board would make redacted copies of the records available for inspection and would provide the requisite exemption logs. Mr. West signed the letter "acknowledged and received" on June 30, 2010. Sweeney Decl. CP 58, ¶ 4; CP 60.

The records subject to inspection, with the accompanying exemption logs, were made available to Mr. West, and he inspected them at the Board offices on June 30, 2010, in the presence of Mr. Sweeney. Sweeney Decl., CP 58, ¶ 5.

**B. This lawsuit.**

In September 2010, Mr. West filed this action against the Board claiming improper assertion of exemptions. The complaint alleged *only* that the deliberative process exemption under the PRA was improperly claimed. Compl., CP 106, ¶ 3.6.<sup>1</sup>

The Board lodged the records in dispute with the superior court under seal as Board's Exhibit B for in camera review (CP 200-1214), pursuant to order of the court and RCW 42.56.550(3).

A dispositive hearing was held April 1, 2011. After reviewing the extensive volume of documents filed for in camera review and the filed exemption log, the superior court found that all redactions and nondisclosure of documents based on the work product and deliberative process claims were related to complaints subject to investigation and possible discipline and, thus, were internal work product and part of the deliberative process between staff and a consulting Board member. The court found that the Board properly asserted all claimed exemptions and had not violated the PRA. Order of Dismissal, CP 77-79 (entered April 29, 2011).

Mr. West petitioned for reconsideration, which the court denied. CP 90-91. This appeal followed.

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<sup>1</sup> Thurston County Superior Court Local Civil Rule 16 established an expedited process for scheduling of PRA cases effective September 1, 2010. Following Mr. West's failure to file his opening brief by the deadline set in the first case scheduling order and his failure to appear at two subsequent status conferences, the court entered an Order Assessing Sanctions and Suspending Potential Penalties that sanctioned Mr. West \$200 and suspended any potential PRA penalties against the Board from November 30, 2010, through February 11, 2011.

**C. The role of the Washington State Board of Accountancy.**

The Washington State Board of Accountancy is responsible for licensing, regulation, and discipline of the certified public accountancy (CPA) profession in Washington. The Board's nine members and its Executive Director are appointees of the Governor. RCW 18.04.035 and 18.04.045. Six of the Board members must have been continuously licensed in this state for the previous ten years. The other three Board members are public members who must be qualified to judge whether the qualifications, activities, and professional practices of CPAs regulated by the Board conform to standards designed to protect the public interest. RCW 18.04.035.

The purpose of the Public Accountancy Act, chapter 18.04 RCW, which the Board is charged to enforce, is, among other things, “[t]o protect the public interest by requiring that [p]ersons who hold themselves out as licensees or certificate holders conduct themselves in a competent, ethical, and professional manner,” and to police the unlicensed practice of public accountancy. RCW 18.04.015(1)(b).

The Board is responsible for the denial of CPA licenses and discipline of CPAs under RCW 18.04.295. It has an established process for conducting investigations into allegations of unprofessional conduct filed against a CPA. Initially, the Executive Director assigns a case to an investigator, who investigates the allegations made against the CPA and reports his or her findings to the Executive Director. Sweeney Decl., CP 58, ¶¶ 6-7.

The Executive Director then appoints a member of the Board, who provides his or her professional opinion as to the facts of the matter and acts as a *consulting expert* on the standards of the profession. *Id.* at ¶ 7. The consulting Board member on a given matter makes a recommendation to the Executive Director as to whether or not charges should be filed, whether a settlement offer in lieu of a formal board hearing could be agreed to by the respondent and the Board, and what sanctions or other remedies should be recommended. The consulting Board member also acts as a consulting expert to the Executive Director and to the Attorney General's Office in connection with potential litigation. *Id.* at ¶ 7. The consulting Board member is screened from the Board members deliberating on that specific matter to avoid ex parte contact and does not normally testify at any hearings on the matter. The consulting Board member's memos offering advice to Board staff are not offered in evidence.

#### **IV. STANDARD OF REVIEW**

The Public Records Act, chapter 42.56 RCW, is "a strongly worded mandate for broad disclosure of public records." *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 33, 769 P.2d 283 (1989). To affect this purpose, the Act is liberally construed in favor of disclosure and its exemptions are narrowly construed. *Confederated Tribes v. Johnson*, 135 Wn.2d 734, 745-46, 958 P.2d 260 (1998); RCW 42.56.030. While the Act requires disclosure of public records upon request, there are specific statutory exemptions from disclosure that allow agencies to withhold

records or to redact portions of them. *Progressive Animal Welfare Soc’y v. Univ. of Washington*, 125 Wn.2d 243, 258, 884 P.2d 592 (1994) (*PAWS*); see RCW 42.56.070(1).

It is the agency’s burden “to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.” RCW 42.56.550(1). The PRA also requires an agency to cite a specific statute and provide a “brief explanation” to the requestor of the basis for the withholding. RCW 42.56.210(3). In the present case, the Board satisfied these requirements.

“Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. . . . Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.” RCW 42.56.550(3). A summary judgment procedure may be used to resolve legal issues related to the PRA. *Guillen v. Pierce Cnty.*, 96 Wn. App. 862, 866 n.6, 982 P.2d 123 (1999), *rev’d in part*, 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003).

When a case, such as this one, is decided solely upon submission of documentary evidence and legal argument, appellate review is de novo. *Confederated Tribes*, 135 Wn.2d at 744.

## V. ARGUMENT

### A. **The Board properly withheld or redacted communications discussing prosecution strategy for specific disciplinary cases under the work product exemption, RCW 42.56.290 and CR 26(b)(4).**

This is a straightforward case because the work product exemption protects the narrow set of records at issue, and the case may be properly decided on that basis alone. The work product exemption, RCW 42.56.290, exempts the particular contents of the records withheld or redacted from inspection by Mr. West because the records were created in the course of preparing cases in anticipation of litigation and are thereby protected by the work product privilege. Disclosure of Board prosecutorial strategy would compromise the public's interest in disciplining CPAs for misconduct or unlicensed practice. *See* RCW 42.56.070(1). The Board appropriately claimed the work product exemption in the exemption logs given to Mr. West.<sup>2</sup>

#### 1. **Records relevant to a controversy that are created by attorneys, or parties without the involvement of their attorneys, are exempt from disclosure under the work product exemption of the PRA and CR 26(b)(4).**

“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” are exempt from disclosure under the PRA.

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<sup>2</sup> It should be noted that Mr. West broadly challenges the trial court's legal conclusions, but does not challenge the application of those legal conclusions to any specific record. Nowhere in his brief does Mr. West cite to any specific record in which he claims exemptions were erroneously claimed, although the exemption log provides a Bates number for every document. CP 128-164 (Ex. A to Board's superior court Response Brief). He leaves it to the Court to figure out which records he is referring to. Therefore, Mr. West has failed to make allegations of error with sufficient specificity.

RCW 42.56.290; *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 731, 174 P.3d 60 (2007). “Controversy” means “completed, existing, or reasonably anticipated litigation.” *Soter*, 162 Wn.2d at 732.

Materials that are entitled to work product protection may be created by attorneys *or by parties or their representatives without the involvement of their attorneys.* *Limstrom v. Ladenburg*, 136 Wn.2d 595, 611-12, 963 P.2d 869 (1998).<sup>3</sup> Civil Rule (CR) 26(b)(4) prohibits discovery of materials disclosing mental impressions, conclusions, opinions, or legal theories concerning and prepared in anticipation of litigation by a party or the party’s representative.<sup>4</sup> Therefore, if such records are entitled to protection as work product under CR 26, they are also exempt from public disclosure as work product. *Soter*, 162 Wn.2d at 733.

The state Supreme Court recently clarified several aspects of the work product exemption under the PRA. First, the “controversy” need not appear on the face of the record claimed exempt—the record need only be

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<sup>3</sup> Mr. West cites *Kammerer v. W. Gear*, 96 Wn.2d 416, 421, 635 P.2d 708 (1981), for the proposition that the attorney-client privilege extends to written communications from an attorney to his client but not to those of a layman. Opening Br., p. 22. The *Kammerer* case has no application to this case. It found that a memorandum between corporate employees transmitting business advice was not protected by the privilege. *Kammerer* is also inapplicable because the records at issue in this case are materials prepared in anticipation of litigation by a party.

<sup>4</sup> CR 26(b)(4) provides that a court may order discovery of materials prepared in anticipation of litigation or for trial by a party or the party’s representative only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. CR 26(b)(4) further provides that, if the court orders discovery of such materials, it shall protect against the disclosure of any “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”

“relevant” to a controversy; second, the records may relate to any controversy to which the agency is a party and need not relate to a particular controversy or controversies; and third, it is not material how long before litigation commences that a document is created, but whether litigation is reasonably anticipated. *Sanders v. State*, 169 Wn.2d 827, 854-58, 240 P.3d 120 (2010).

In the present case, the withheld or redacted records were prepared by a party and reveal mental impressions, conclusions, and opinions that were prepared, collected, or assembled in litigation or in anticipation of litigation. They are thus not subject to pretrial discovery under CR 26(b)(4), and the Board properly withheld or redacted them.

**2. The withheld or redacted records are comprised of communications created in the course of making decisions on prosecution strategy in disciplinary cases.**

This case involves records that are communications by and with a Board member acting as a “consulting expert,” and between the Board prosecution staff members, regarding analysis of the facts of a case in light of acceptable professional standards, created in anticipation of issuing and litigating charges of professional misconduct. Such records are not merely the documentation of the factual investigation of cases. The consulting Board member acts as an independent consulting expert (not a testifying expert) for the Executive Director in evaluating cases and for the prosecuting assistant attorney general when cases are referred to the Attorney General’s Office for charging and litigating.

An illustrative example of exempt communications involving prosecutorial strategy between the Executive Director and a consulting Board member may be found in the records lodged with the Court as Exhibit B, CP 216-220 (Bates Nos. DEF-02-0000364—DEF-02-0000368). This is an email string between Executive Director Rick Sweeney and Board Member Sharron O'Donnell, the consulting Board member assigned to the case, concerning Case No. 2005-026. Ms. O'Donnell served as a professional expert consultant on the standards of the profession. As the consulting Board member, she had the authority to make a recommendation to the Executive Director and prosecution team as to whether or not charges should be filed, whether a settlement should be offered, and what sanctions should be pursued. The email contains the Executive Director's analysis as to the merits of the case following an investigation and Ms. O'Donnell's professional opinion as to whether the respondent complied with the standards of the profession.

The contents of the email, which detail Mr. Sweeney's and Ms. O'Donnell's evaluation of the merits of the case and potential charges, settlements, and sanctions, are protected from discovery under the work product privilege and are therefore exempt from disclosure under RCW 42.56.290.<sup>5</sup>

To be clear, the Board is not asking this Court to apply the work product exemption to the entire body of records created in its investigative

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<sup>5</sup> They are also exempt under the deliberative process exemption, RCW 42.56.280, which is further discussed below.

and prosecutorial process. There is a distinction between protected work product created by the agency in anticipation of litigation and investigative records that can be disclosed upon the conclusion of an investigation. At the conclusion of an investigation, even if a case is charged, the investigative file containing factual information is generally subject to disclosure under the PRA. The consulting Board member memos, and communications between Board staff members discussing prosecution strategy in specific cases, are not. For case files from which records are withheld as work product, the Board would disclose the remainder of any investigative files that are not subject to a separate exemption.

In *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 706 P.2d 212 (1985), the state Supreme Court distinguished between documents created in anticipation of litigation from those created in the regular course of business. Mrs. Heidebrink, an automobile driver, and her husband brought an action against Mr. Moriwaki who allegedly burned grain stubble on a field creating smoke on an adjacent road that enveloped Mrs. Heidebrink's vehicle and caused her to crash. *Id.* at 393-94. At the time of the incident, Mr. Moriwaki carried a liability insurance policy, issued by Continental Insurance Company (Continental), that contractually obligated Continental to defend Mr. Moriwaki against all insured claims. *Id.* at 394.

Two days after the accident, an investigator and adjuster for Continental contacted Mr. Moriwaki and tape-recorded his statement regarding the accident. *Id.* The court held that this statement made by an insured to his insurer following the automobile accident was protected

from discovery under the rule that governs discovery of documents and tangible things prepared in anticipation of the litigation, CR 26. *Id.* at 400. The *Heidebrink* court declined to follow a line of cases from other states that found statements made by witnesses were gathered in the regular course of business, rather than in anticipation of litigation. *Id.* at 396-99.

As an initial matter, the *Heidebrink* court recognized that CR 26 embodies “the policies set forth by the United States Supreme Court over three decades ago in the now famous decision of *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947).” *Heidebrink*, 104 Wn.2d at 395. Moreover, “under both the federal and Washington rules, there is *no* distinction between attorney and non-attorney work product. The test for determining whether such work product is discoverable is whether the documents were prepared in anticipation of litigation and, if so, whether the party seeking discovery can show substantial need.” *Id.* at 396 (emphasis added).

The *Heidebrink* court squarely addressed situations in which the regular course of a particular business is to gather information related to reasonably potential litigation, saying that such situations should be evaluated based on the specific parties involved and those parties’ expectations.

The requirement of having an attorney involved in the case before documents prepared by an insurance carrier are protected is a rather conclusory determination of the issue and is contrary to the plain language of the rule. On the other hand, broad protection for all investigations conducted by an insurer as suggested by several cases cited

by respondents is likewise an unsatisfactory answer to the problem. Should such a rule of thumb approach become the general rule, it is not hard to imagine insurers mechanically forming their practices so as to make all documents appear to be prepared in “anticipation of litigation”. We believe the better approach to the problem is to look to the specific parties involved and the expectations of those parties.

*Heidebrink*, 104 Wn.2d at 399-400.

Communications among the Executive Director, Board staff, and a consulting Board member regarding prosecution strategy within the Board’s case processing framework, whether or not the Attorney General’s Office is consulted, are work product created in anticipation of litigation, not merely records created in the regular course of business. The filing of a complaint creates a controversy, and from that point on, the Board is acting in reasonable anticipation of litigation. Consulting Board member memos are created for the *sole purpose* of evaluating the Board investigator’s completed investigation and aiding in the decision to charge a case or offer a settlement and to recommend sanctions or other remedies.

As in *Heidebrink*, the purpose of the work product protection is equally applicable here. Should consulting Board member memos be unprotected, they would either cease to exist or exist in a less detailed (and less useful form). It is also important to stress that a consulting Board member memo is a consulting expert opinion that never is shared in discovery or testimony in adjudicative proceedings. The information in consulting Board member memos is more strongly protected than the statements in *Heidebrink*. Even though insureds’ statements to their

insurers are protected, subsequent testimony by an insured is likely to occur because they are fact witnesses. In contrast, consulting Board member memos are central to the mental impressions, opinions, and strategies that are guarded by the work product doctrine.

To return to consideration of the email example discussed above, the analysis and opinions of the Executive Director and consulting Board member, as a consulting expert who is part of the prosecution team, are relevant to Board disciplinary proceeding 2005-026, a controversy to which the Board was a party. The document was created in reasonable anticipation of litigation, therefore it would not be discoverable and is exempt from disclosure under the PRA regardless of whether or not charges were issued. Whether a case is ultimately charged, settled, or closed without charges does not defeat the privilege. Thus the Board appropriately applied the exemption when it received a request for public disclosure.

*Soter v. Cowles Publ'g Co.* involved a student who tragically died after ingesting a peanut butter cookie served to him during a school field trip. *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 722, 174 P.3d 60 (2007). The surviving relatives of the student filed a wrongful death suit against the school district, which settled short of trial. *Id.* A local newspaper sought, under the PRA, records created during the course of the district's investigation of the incident, and sued when the records were withheld under the work product doctrine. *Id.* at 723. The *Soter* court found that the school district properly withheld the investigative report.

*Id.* at 723 and 757. The most relevant section of the court’s analysis stated:

The Spokesman-Review and amici Allied Daily Newspapers argue that the documents at issue should be treated as if they were created in the ordinary course of business, not in anticipation of litigation. But specific litigation was anticipated from the outset in this case, reasonably so given the facts, and the dominant purpose of the attorneys’ investigation was to prepare to defend a claim brought by Nathan’s family. Thus, the Walters family’s potential wrongful death claim against the school district amounts to a “controversy” for purposes of RCW 42.56.290, the controversy exception still applies even though the claim has been settled, and the documents at issue were prepared in anticipation of litigation. The documents at issue were created by or gathered by members of the legal team. Thus, we conclude that the trial court and Court of Appeals were correct in classifying the documents as work product.

*Soter*, 162 Wn.2d at 733 (internal citations and footnotes omitted).

Similarly, here, the records withheld by the Board were created in the course of investigating allegations against CPAs and in determining whether and how to bring charges. They were, therefore, prepared in anticipation of litigation and are exempt under the PRA’s work product exemption, RCW 42.56.290.

**3. Work product documents remain exempt even after litigation is terminated.**

The state Supreme Court has repeatedly emphasized that the work product protection “continues even after the prospect of litigation has terminated.” *Soter*, 162 Wn.2d at 732; *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993). The underlying purposes served by the work

product doctrine can be preserved only if the protection continues even after litigation has been resolved. *Harris v. Drake*, 152 Wn.2d 480, 489-90, 99 P.3d 872 (2004).

In applying the work product doctrine, courts do not distinguish between completed and pending litigation, in part because the looming possibility of disclosure, even disclosure after termination of a lawsuit, would cause attorneys and parties to hesitate to reduce their thoughts or understanding of the facts to writing. *Soter*, 162 Wn.2d at 732-33, *citing Limstrom*, 136 Wn.2d at 613. Thus, simply because litigation may have been terminated in a particular case does not mean that communications regarding prosecution strategy lose their exempt status. The prospect of disclosure would most likely cause the Board's Executive Director and consulting Board members to cease communicating their thoughts, understanding of the facts, or recommended sanctions in writing when preparing prosecution strategy. *Sweeney Decl.*, CP 58-59, ¶ 8.

In *Dawson v. Daly*, the state Supreme Court upheld a claim of exemption, on work product grounds, for documents prepared for use in cross-examining an expert witness who frequently testified in child sexual abuse cases. The court held that when documents are both relevant to a controversy, which includes completed, existing, or reasonably anticipated litigation, and protected under the work product rule, the exemption in RCW 42.56.290 will apply. *Dawson*, 120 Wn.2d at 791.

By interpreting controversy as encompassing either anticipated litigation or ongoing or completed litigation, our state Supreme Court has

interpreted RCW 42.56.290 in accord with the clear intent of the statute to protect work product from public disclosure on a continuing basis. In this way, moreover, RCW 42.56.290 is harmonized with the work product privilege in our court rules.

**B. The Board also properly withheld or redacted the records in this case under the deliberative process exemption, RCW 42.56.280, as preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated.**

As noted above, this is a straightforward case because the work product exemption protects all records at issue, and the case may be properly decided on that basis alone. All that is necessary to resolve this case is for the Court to decide whether the records at issue are protected work product.

However, the Board also appropriately claimed the deliberative process exemption under RCW 42.56.280 as to all of the records at issue. An agency may claim any applicable exemptions under the PRA, even if more than one exemption applies to the same record.

**1. Deliberative process memos that elucidate prosecution strategy for specific disciplinary cases must remain exempt from public disclosure after the disciplinary case is resolved.**

RCW 42.56.280 exempts the following records from disclosure:

Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt under this chapter, except that a specific record is not exempt when publicly cited by an agency in connection with any agency action.

The exemption “only protects documents which are part of a ‘deliberative or policy-making process.’” *Brouillet v. Cowles Pub’g Co.*, 114 Wn.2d 788, 799, 791 P.2d 526 (1990) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 133, 580 P.2d 246 (1978)). The purpose of this exemption “is to allow frank and uninhibited discussion during the decision-making process.” *Hoppe*, 90 Wn.2d at 132.

In order to rely on this exemption, an agency must show:

[1] that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process;

[2] that disclosure would be injurious to the deliberative or consultative function of the process;

[3] that disclosure would inhibit the flow of recommendations, observations, and opinions;

[4] and finally, that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based.

*PAWS v. Univ. of Washington*, 125 Wn.2d 243, 256, 884 P.2d 592 (1994) (citations omitted).

In short, if disclosure reveals and exposes the deliberative process (and is otherwise injurious), the exemption applies.

The deliberative process exemption is not claimed here for policy discussions, but for draft and final consulting Board member memos and Board staff memos discussing prosecution strategy for specific disciplinary cases. In the context of this case, the Board’s disciplinary case handling is a deliberative process. Consulting Board member memos

are not cited to or offered at any hearings in the course of adjudicative proceedings and remain confidential.

These documents that formulate prosecution strategy in professional disciplinary cases must remain exempt regardless of the outcome of the case in order to “allow frank and uninhibited discussion during the decision-making process,” consistent with the purpose of the exemption. *Hoppe*, 90 Wn.2d at 132.

Thus, because the records withheld or redacted by the Board contain opinions and recommendations regarding prosecution strategy in professional disciplinary cases, the disclosure of which would impair the Board’s ability to discipline CPAs for misconduct or unlicensed practice and inhibit the flow of recommendations, observations and opinions, the superior court properly concluded the exemption was rightfully claimed.

Because the PRA closely parallels the Freedom of Information Act (FOIA), state courts have looked to judicial interpretations of FOIA for guidance when construing exemptions under the PRA, including the deliberative process exemption. Subsection (b)(5) of FOIA exempts “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” Courts have described the purpose of FOIA’s subsection (b)(5) exemption similarly to the PRA’s deliberative process exemption. *See, e.g., Env’t Prot. Agency v. Mink*, 410 U.S. 73, 87, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973) (the purpose of such an exemption is to protect the give and take of deliberations).

The Washington Supreme Court, early on in its review of the PRA deliberative process exemption, looked to subsection (b)(5) of FOIA in *Hearst Corp. v. Hoppe*.

*Hoppe* described the purpose and scope of the above-quoted FOIA exemption as construed by the federal courts and applied the federal court's construction of subsection (b)(5) to RCW 42.56.280.<sup>6</sup> In this respect, *Hoppe* explained:

[A]ccording to federal courts, the policy is to protect the give and take of deliberations necessary to formulation of agency policy. That privilege is not absolute and the executive must establish that documents contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative or policy-making process. There must also be a showing by the executive that the disclosure of these opinions would be injurious or detrimental to the agency's deliberative or consultative function. (citations omitted)

The purpose of the exemption severely limits its scope. Disclosure must be shown to inhibit the flow of recommendations, observations, and opinions before the exemption can be invoked. Because the exemption is intended to safeguard the free exchange of ideas, recommendations, and opinions prior to decision, *the opinions or recommendations actually implemented as policy lose their protection when adopted by the agency*. Further, only those portions of documents actually reflecting policy recommendations and opinions may be withheld under the exemption. Factual data, even when contained within otherwise exempt memoranda, must therefore be produced

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<sup>6</sup> "Courts have construed [subsection (b)(5)] to exempt from disclosure documents which are protected from civil discovery under the attorney-client privilege, *Mead Data Cent., Inc. v. Air Force*, 566 F.2d 242 (D.C. Cir. 1977), the attorney work-product privilege, *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975), and the executive, deliberative process privilege, *Env't Protect. Agency v. Mink*, 410 U.S. , 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973)." *King v. Internal Revenue Serv.*, 684 F.2d 517, 519 (C.A. Ill. 1982).

because the rationale for the exemption, protection of the decision-making process, is wholly inapplicable to factual material. Unless disclosure reveals and exposes the deliberative process, as opposed to the facts upon which a decision is based, the exemption cannot apply. (citations omitted.)

*Hoppe*, 90 Wn.2d 132-34 (emphasis added).

As quoted above, part of the formulation stated by *Hoppe* is that, “[b]ecause the exemption is intended to safeguard the free exchange of ideas, recommendations, and opinions prior to decision, the opinions or recommendations actually implemented as policy lose their protection when adopted by the agency.” *Id.* at 133 (emphasis added).

When one reads the federal cases that *Hoppe* cites for this point, it is apparent that *Hoppe* is referring to final opinions or recommendations of federal agencies and circumstances where intra-governmental draft documents are cited as justification for an agency policy decision. Thus, under *Hoppe*, the documents at issue here, which formulate prosecution strategy in particular disciplinary cases, should retain their protection because they are neither implemented as policy nor cited as justification for agency policy decisions. This result is consistent with the purpose of the exemption.

Mr. West relies on *PAWS v. Univ. of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994) and *West v. Port of Olympia*, 146 Wn. App. 108, P.3d 926 (Div. I, 2008), to argue that “the deliberative process exemption can only be applied to ongoing deliberations” and thus does not apply to the consulting Board member memos contributing to the formulation of

prosecution strategy at issue here. Appellant's Br. 10. But *PAWS* or *West v. Port of Olympia* did not address the deliberative process of formulating prosecutorial strategy and so are of limited use here.

The state Supreme Court in *PAWS* considered "whether information in a university researcher's unfunded grant proposal involving use of animals in scientific research must be disclosed under the laws governing disclosure of public records." *PAWS*, 125 Wn.2d at 247. The records at issue included "pink sheets" prepared in a confidential peer review process at the National Institutes of Health. The pink sheets commented on and recommended whether a proposal should be approved or disapproved and its funding rank. In determining whether the pink sheets were exempt from disclosure under RCW 42.56.280, *PAWS* generally paraphrased the federal court formulation of subsection (b)(5) from *Hoppe*, and reiterated that formulation from an intervening case, *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990).

In this respect, *PAWS* stated, "[o]nce the policies or recommendations are implemented, the records cease to be protected under [RCW 42.56.280]." *PAWS*, 125 Wn.2d at 257. Applying this formulation, *PAWS* concluded:

While the unfunded grant proposal itself does not reveal or expose the kind of deliberative or policy-making process contemplate by the exemption, the so-called "pink sheets" do. Because the pink sheets foster a quintessentially deliberative process, we hold they are exempt from disclosure under this provision, but only while they pertain to an unfunded grant proposal. [footnote omitted.] Once

the proposal becomes funded, it clearly becomes “implemented” for purposes of this exemption, and the pink sheets thereby become disclosable.

*Id.*

The *PAWS* pronouncement in this respect is less clear than the statement in *Hoppe* and is being misunderstood at times by litigants and the courts to be far broader than the federal cases or the language of RCW 42.56.280 would support. For example, it appears to have been understood by the Court of Appeals to mean that the exemption in RCW 42.56.280 lasts only until the agency makes a final decision and then is lost as to any and all drafts and recommendations relating to the decision. *See West v. Port of Olympia*, 146 Wn. App. at 108. Like *PAWS*, the *West v. Port of Olympia* case is not on point here because it concerned records relating to contract negotiations, not the deliberations of prosecutors making strategy decisions in adjudicative proceedings.

Because neither *PAWS* or *West v. Port of Olympia* addresses the deliberative process of formulating prosecutorial strategy, it is more appropriate to return to the express language of RCW 42.56.280 and the federal court’s construction of FOIA subsection (b)(5). The deliberative process privilege exempts “all papers which reflect the agency’s group thinking in the process of working out its policy and determining what its law shall be.” *Nat’l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 153, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975). Under federal law, “[a] deliberative document loses its exempt status *only* if it is subsequently cited in agency documents or relied on as an accurate statement of agency

law.” *King v. Internal Revenue Serv.*, 684 F.2d 517, 520-21 (1982) (emphasis added).

Relying on the express language of RCW 42.56.280, as interpreted through the lens of subsection (b)(5) of FOIA, demonstrates that materials prepared by the Board’s prosecution team in preparation for disciplinary cases remain exempt under the deliberative process exemption, even after the conclusion of those cases. The principal reason for the exemption—to protect the free flow of ideas and frank discussion—is central to the Board’s disciplinary process. Such records should not be disclosed at any time or the Board’s ability to carry out its responsibility to discipline members of the CPA profession would be impaired.

**2. Even under the PAWS analysis, consulting Board member memos in disciplinary cases should remain permanently exempt from public disclosure.**

The *PAWS* case held that “pink sheets” prepared in a confidential peer review process of grant proposals were permanently exempt from public disclosure in cases where the grant was not funded. *PAWS*, 125 Wn.2d at 257. If the *PAWS* analysis is applied by analogy to consulting Board member memos, those memos would remain permanently exempt in at least some, and arguably all Board disciplinary cases. First, memos produced in Board disciplinary cases in which no charges are filed would remain permanently exempt from disclosure, because not filing charges is plainly equivalent to not funding a grant. Second, memos in cases in which charges are filed that do not result in disciplinary action would

similarly remain permanently exempt, because a non-sanction is more like the non-decision of not funding a grant than the affirmative decision to fund. Finally, even memos in cases in which charges are filed that result in disciplinary action should remain permanently exempt, because the decision to file charges (as opposed to the ultimate disposition of those charges) is qualitatively different from the conclusive and dispositive decision to fund a grant. The choice to file charges remains inherently preliminary and inconclusive, without regard to the ultimate disposition of those charges.

**C. The exempt records were not disseminated to third parties, the Open Public Meetings Act does not apply, and the law enforcement exemption of RCW 42.56.240 does not apply.**

Mr. West's brief makes repeated false representations about the facts of this case in two ways, neither of which have any basis in the record.

First, he alleges that the records for which exemptions were claimed were disseminated to third parties. Opening Br. at 6, 7, 8, 19, 22, 23. There is nothing in the record to support his assertion that the work product privilege was waived as to any of these records. To the contrary, the records remain under seal in this litigation.

Second, Mr. West alleges violations of the Open Public Meetings Act, chapter 42.30 RCW, which is a cause of action that he did not assert in his complaint. Opening Br. at 4, 16, 17, 18. Again, he misrepresents the facts and records at issue. The email communications that are at issue in this case, between the Executive Director and a single consulting

Board member or between Board prosecution staff members, were part of the process of resolving adjudicative proceedings under the Administrative Procedure Act, chapter 34.05 RCW. *See* RCW 18.04.320; RCW 34.05.410-.494. None of the emails involve “action” by a quorum of the nine-member Board that is governed by Open Public Meetings Act requirements. *See* RCW 42.30.020(3). The Open Public Meetings Act does not apply to matters governed by the Administrative Procedure Act, such as disciplinary case processing in adjudicative proceedings. RCW 42.30.140(3). The Open Public Meetings Act is simply irrelevant to this case.

Finally, Mr. West appears to argue that the Board should have claimed an exemption it did not claim, RCW 42.56.240, the law enforcement investigation exemption, but that the records are not exempt under that statutory provision anyway. He does not provide the statutory citations for or fully explain the exemptions that the Board did claim, RCW 42.56.280 and 42.56.290. Nonetheless, because the Board properly exempted records from disclosure under the work product and deliberative process exemptions of the PRA, the Court need not reach Mr. West’s argument concerning the law enforcement investigation exemption that the Board did not claim.

## **VI. CONCLUSION**

The Board has met its burden to establish that the records at issue were work product prepared in anticipation of litigation and are exempt from disclosure under RCW 42.56.290. The deliberative process

exemption under RCW 42.56.280 also applies to these records. For the reasons set forth above, the Board respectfully requests that the Court affirm the superior court's ruling dismissing Mr. West's action with prejudice, with no penalties or attorney's fees awarded to Mr. West.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of March 2012.

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# WASHINGTON STATE ATTORNEY GENERAL

**March 14, 2012 - 8:22 AM**

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NO. 42331-6

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

ARTHUR WEST,

Appellant,

v.

WASHINGTON STATE BOARD OF  
ACCOUNTANCY,

Respondent.

CERTIFICATE OF  
SERVICE

I, Rain Dineen, declare under penalty of perjury under the laws of the state of Washington that on March 14, 2012, I caused to be served a true and correct copy of **Respondent's Brief** to be served hand delivery via Consolidated Mail Service in the above-referenced matter on:

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RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of March 2012.

*Rain Dineen*

RAIN DINEEN, Legal Assistant

# WASHINGTON STATE ATTORNEY GENERAL

## March 14, 2012 - 8:30 AM

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