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COURT OF APPEALS  
DIVISION II

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No. 42331-6-II

STATE OF WASHINGTON

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

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**ARTHUR WEST,  
appellant,**

**Vs.**

**WASHINGTON STATE BOARD OF  
ACCOUNTANCY, STATE OF WASHINGTON,  
respondents**

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**Appeal from the rulings of  
the honorable Judge Casey**

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**APPELLANT'S OPENING BRIEF**

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**Arthur West  
120 State Ave N.E. #1497  
Olympia, Washington, 98501**

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## **SUMMARY OF ARGUMENT**

This is an action under the Public Records Act for disclosure of records improperly withheld under claim of the Deliberative Process and Attorney Client exemptions. (see Exemption Log) Most of the records withheld are apparently communications between members of the Board of Accountancy several years old concerning matters that were decided long ago. It is difficult to imagine circumstances under which the State could legitimately claim such records to be exempt under any reasonable construction of the deliberative process exemption.

In addition, the work product and attorney client exemption are claimed very broadly for many records, some of which were merely forwarded to counsel or were not either sent or received by an attorney. In addition, the attorney client exemption is used for communications between Board of Accountancy members themselves, in what may be an attempt to veil possible serial violations of the Open Public Meetings Act. This is also a case involving a previous action in which the Washington State Board of Accountancy entered into a settlement agreement for \$500,000 to settle claims brought by an individual that the agency attempted to formally discipline. The previous settlement agreement left un-adjudicated the issue of whether records submitted to the Court in that

case for in camera inspection were subject to the attorney-client and deliberative process exemptions.

Plaintiff West appeared at the hearing on sealing the records in the underlying action and spoke against any order which would prejudice their subsequent disclosure, if they were not properly privileged. West then filed a request for the records and instituted the present suit.

Despite the existence of a narrow and appropriate exemption in the public records Act specifically directed at agencies entrusted with authority to discipline professional occupations, the Board of Accountancy attempted to over broadly employ the Attorney Client and Deliberative Process exemptions in a manner at variance with the terms of RCW 42.56.030, which requires that the PRA be broadly interpreted and its exemptions narrowly construed.

Washington Courts have universally held that the PRA must be “liberally construed and its exemptions narrowly construed” to ensure that the public’s interest is protected. *Morgan v. City of Federal Way*, Supreme Court No. 81556-1, citing RCW 42.56.030; *Livingston v. Cedeno*, 164 Wn.2d 46, 50, 186 P.3d 1055 (2008). Under a narrow interpretation of the exemptions claimed by the Board of Accountancy, the vast majority of the records in their privilege log do not qualify as exempt records.

This is even more apparent when one recognizes that the BOC has a narrow and specific exemption that specifically applies to it, which it entirely failed to employ., RCW 42.56.240, that provides..

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

(1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.

The Court erred in allowing and approving the use of the deliberative process exemption when all related determinations had been concluded, and when the agency had failed to demonstrate that the release of the records would irreparably damage the agency or interfere with its functions.

The Court also erred in over broadly interpreting the Attorney Client exemption, to include records that were not prepared for or by an attorney, records that were disseminated to 3<sup>rd</sup> parties, and records for which the privilege was waived or which otherwise failed to meet the requirements of properly exempt records, in a manner the broadly extended the exemption beyond the narrow construction mandated by statute.

## **ASSIGNMENTS OF ERROR**

**I** The Court erred in upholding a deliberative process exemption when the records related to issues and official Board actions that were concluded and when the requirements for assertion of the deliberative process were not demonstrated to be present, in violation of *West v. Port of Olympia*.

**II** The Court erred in allowing the Board of Accountancy to over broadly employ the Attorney Client, Work Product, and Deliberative Process exemptions in a manner at variance with the terms of RCW 42.56.240, which provides for a more limited exemption, and RCW 42.56.030, which requires that the PRA be broadly interpreted and its exemptions narrowly construed.

**III** The Court also erred in over broadly interpreting the Attorney Client exemptions to include communications between Board members, records not prepared for or by an attorney, records that were disseminated to 3<sup>rd</sup> parties, and records for which the privilege was waived or which otherwise failed to meet the requirements of properly exempt records, in a manner that broadly extended these exemption beyond the narrow construction mandated by statute.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**I** Did the Court err in upholding a deliberative process exemption when the records related to issues and official Board actions that were concluded and when the requirements for assertion of the deliberative process were not demonstrated to be present, in violation of PAWS and *West v. Port of Olympia*?

**II** Did the Court err in allowing the Board of Accountancy to over broadly employ the Attorney Client, Work Product, and Deliberative Process exemptions in a manner at variance

with the terms of RCW 42.56.240, which provides for a more limited exemption, and RCW 42.56.030, which requires that the PRA be broadly interpreted and its exemptions narrowly construed?

III Did the Court err in over broadly interpreting the Attorney Client exemptions to include communications between Board members, records not prepared for or by an attorney, records that were disseminated to 3<sup>rd</sup> parties, and records for which the privilege was waived or which otherwise failed to meet the requirements of properly exempt records, in a manner that broadly extended these exemption beyond the narrow construction mandated by statute?

## **STATEMENT OF THE CASE**

This case involves a complaint for disclosure of records of initiatives filed on September 24, 2010. (CP 103-105)

In July of 2010, plaintiff filed s request for disclosure of Board of Accountancy Records (CP 61-62)

On July 30, 2010, after an initial response that failed to assert exemptions, the BOC asserted exemptions and subsequently produced an exemption log.

The Board of Accountancy's exemption log asserted exemptions under deliberative process, attorney client, and work product, despite the circumstance that the deliberations that the records concerned were

several years old and concluded, and despite the circumstance that many of the records were not prepared by or sent to counsel. (CP at 30-47, 88, 85-87)

The records submitted for in camera review (see Clerk's exhibit included records that related to deliberations concluded prior to 2006, and records that were prepared by and sent between Board of Accountancy Board Members as part of BOC deliberations. (CP at 30-47, 88)

On October 29, 2010 a status conference was held. (CP at 7)

On January 28, 2011 another status conference was held. (CP at 10)

On January 31, 2011 a show cause order was signed. (CP at 10)

On February 11, 2011, a further status conference was held.

On April 1, 2011 A hearing was held (CP 72) and an Order for in camera re view issued.(CP at 74-5)

On April 29, 2011 an Order of Dismissal was signed (CP 77-79)

On May 9, 2011 a motion for reconsideration was filed (CP 80-88)

On June 2, 2011 the Court issued a decision, (CP at 92) and on June 3, 2010, a final Order was filed. (CP 94-5)

On March 7, 2010 a timely notice of appeal was filed. (CP 93-102)

## **ARGUMENT**

**I The Court erred in extending the deliberative process exemption to records related to deliberations and official Board actions that had long been concluded and in exempting records when the requirements for assertion of the deliberative process were not demonstrated to be present, in violation of PAWS and West.**

This case concerns an appeal of the Orders of the Court of April 29 and June 3, 2011, appearing in the record at CP 77-79 and 94-95.

In this matter, the circumstance that the records that the BOC sought to exempt from disclosure were 5 years old is determinative of the issue of whether deliberative process applies, as any deliberative process that might have existed at one time had long been concluded prior to the denial of appellant West's Public Records Request.

The black letter precedent of PAWS and *West v. Port of Olympia* cannot be distinguished, and clearly establish that the deliberative process exemption can only be applied to ongoing deliberations...

However, once the agency implements the policies or recommendations, such records are no longer exempt under the deliberative process exemption. *West v. Port of Olympia*, 146 Wn. App. 108, (2008), citing *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 256, 884 P.2d 592 (1994) (*PAWS*).»

In this case, the BOC made no showing that the records concerned any existing deliberation, which had not been concluded, or any reasonable damage that might result from their disclosure. As such it was

an error of law for the Court to conclude that the deliberative process exemption applied, and an error of fact to conclude that the requirements for assertion were present when the agency had failed to meet its burden under the PRA to justify its exemptions and establish that the record were properly exempt. (See RCW 42.56.550)

Defendants cannot distinguish PAWS and West from the present case, and can produce no convincing argument why deliberative process should apply when deliberations have long been concluded.

The Court erred in finding that the BOC properly invoked the deliberative process exemption when the records related to issues and official Board actions that were concluded and when the requirements for assertion of the deliberative process were not demonstrated to be present.

**II The Court erred in allowing the Board of Accountancy to over broadly employ the Attorney Client, Work Product, and Deliberative Process exemptions in a manner at variance with the terms of RCW 42.56.240, which provides for a more limited exemption, and RCW 42.56.030, which requires that the PRA be broadly interpreted and its exemptions narrowly construed.**

The Board's response indicates a profound confusion as to the status and duties of State officers like the members of the Board of Accountancy, as well as the exemptions in the Public Records Act that

properly apply to “state agencies vested with the responsibility to discipline members of any profession”, and the limited scope of these exemptions as they pertain to the activities of the Board of Accountancy, a Board required to comply with the both the Public Records Act and the Open Public Meetings Act in making its determinations.

Even a superficial review of the actual exemptions applicable to the Board and the manner in which they differ from those that the Board is attempting to assert demonstrates that the privilege log in this case is an attempt to over broadly apply exemptions that were never intended to apply to the specific circumstances of a “state agency” such as the Board of Accountancy, which is entrusted with “the discipline of members of a profession”.

The Legislature, in enacting RCW 42.56.240, has already considered the particular status of the Board, which is neither a criminal justice agency and does not perform the functions of a deputy prosecutor or municipal attorney. The Board should not be allowed to ignore the exemptions that apply to it in order to seek over broad applications of inapplicable exemptions, or construction of the deliberative process exemption beyond that established in the binding precedent of *West v. Port of Olympia*.

Contrary to the declaration filed by counsel, the purpose of the Board of Accountancy is set forth in RCW 18.04.015, which provides in pertinent part, under the heading, PURPOSE...

(1) It is the policy of this state and the purpose of this chapter:

(a) To promote the dependability of information which is used for guidance in financial transactions...public, private or governmental; and

(b) To protect the public interest

In regard to the public nature of the records of the Board of Accountancy, 18.04.045 provides, in pertinent part...

**(4) The board shall keep records of its proceedings, and of any proceeding in court arising from or founded upon this chapter. Copies of these records certified as correct under the seal of the board are admissible in evidence as tending to prove the content of the records.**

Significantly, in regard to the Peer Review Committees, the legislature has provided for confidentiality as RCW 18.04.405 provides...

(3) The proceedings, records, and work papers of a review committee shall be privileged and shall not be subject to discovery, subpoena, or other means of legal process or introduction into evidence in any civil action, arbitration, administrative proceeding, or board proceeding and no member of the review committee or person who was involved in the peer review process shall be permitted or required to testify in any such civil action, arbitration, administrative proceeding, or board proceeding as to any matter produced, presented, disclosed, or discussed during or in connection with the peer review process, or as to any findings, recommendations, evaluations, opinions, or other actions of such committees, or any members thereof.

Information, documents, or records that are publicly available are not to be construed as immune from discovery or use in any civil action, arbitration, administrative proceeding, or board proceeding merely because they were presented or considered in connection with the quality assurance or peer review process.

Obviously, the propriety and limits of confidentiality of Board proceedings were considered by the legislature and the overly broad scope of immunity from disclosure urged by respondents' counsel in their brief was rejected in favor of the limited exemptions that actually appear in statute that directly apply to activities of the Board.

Under the doctrine of *Expressio Unius Exclusio Alterus* and the reasoning of the Court in *Spokane Fire District No. 9 V. Spokane Boundary Review Board*, 27 Wn.App 481, (1980), the expression of a limited exemption from disclosure for “**...State agencies vested with the responsibility to discipline members of a(ny) profession,...**” in RCW 42.56.240 is controlling in regard to the public records of the Board of Accountancy.

Under these mandatory rules of construction, the broad interpretation of the exemptions to disclosure urged by the Board must be rejected for the more limited scope of exemptions actually provided to regulatory agencies under the specific law that applies to such agencies, RCW 42.56.240, which provides a more limited exemption specifically

directed at professional regulatory agencies such as the Board of Accountancy...

RCW 42.56.240(1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and **state agencies vested with the responsibility to discipline members of any profession**, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy;

The Records withheld by the Board in this case do not meet the requirements of “specific intelligence information” or “specific investigative records” the nondisclosure of which is “essential to effective law enforcement” or the right to privacy, and as such the asserted exemptions cannot be justified under the required narrow interpretation of the exemptions to the PRA, since...

It is well settled that a reviewing court interprets the disclosure provisions of the public records act liberally and the exemptions from disclosure narrowly. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 450, 90 P.3d 26 (2004); *see also* former RCW 42.17.251 (1992); RCW 42.56.030. In general, an agency must disclose a public record unless a statutory exemption applies. *Hangartner*, 151 Wn.2d. at 450; former RCW 42.17.260(1) (1997); RCW 42.56.070(1).

Since the statutory exemption for agencies entrusted with the responsibility to discipline members of a profession has been deliberately and narrowly drawn by the legislature, the Board's attempt to exempt

public records from disclosure through the over broad “back door” of improperly asserted inapplicable exemptions must be denied.

This is particularly apparent in the Board's attempt to stretch the Case or controversy exemption to the breaking point where it would encompass virtually all of the Boards actions. As the Board explains their view in counsel's Brief..

The minute a complaint is filed there is a controversy and is in reasonable anticipation of litigation. Defendant's Brief, Page 18, lines 10-11

If this rule of thumb should become the general rule, the Board will be enabled to completely ignore the requirements specified by the Legislature in RCW 42.56.240 and mechanically define controversy in this manifestly over broad manner that encompass all of its actions, rendering both the PRA and OPMA meaningless.

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". Heidebrink v. Moriwaki, 104 Wn. 2d 392, 706 P 2d 212(1985)

Nowhere is the profound misconception of the nature of our political order entertained by counsel more apparent than in the

declaration of Sweeney that decries the “Chilling Effect” of the application of the Sunshine laws to the Board of Accountancy. (See Sweeny Declaration, at Page 3, line 1)

As the landmark march 25, 2011 decision of the honorable Judge Robert Junell in *Asgeirson v. Attorney General Abbot and the State of Texas* notes at length, in a manner far more eloquent than plaintiff West is capable of, the 1<sup>st</sup> Amendment compels disclosure of such public information, and does not operate as a bar to the disclosure of matters related to public governance of a democratic society.

As Judge Junell recognizes, the Open Public Meetings Acts impose mandatory requirements upon the activities of public officers such as the City council members of the City of Alpine or the Washington State Board of Accountancy. Under RCW 42.30.020, the Washington State Open Public Meetings Act, (similar to Texas' TOMA), a “Public agency” is defined as

(1)(a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature;...

Further, a “governing body” is defined under the OPMA as ...the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes

testimony or public comment.

These definitions cannot be reasonably interpreted in any manner other than to include the Board of Accountancy.

Finally, the definition of "Action" under the OPMA includes determinations such as those enumerated by Mr. Sweeny in his declaration...

(3) "Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. "Final action" means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.

In summary, the legislature has specified the scope of exemptions applicable to the particular situation of state agencies entrusted with the responsibility to discipline members of a profession. This exemption is narrowly circumscribed and found in RCW 42.56.240.

In light of this manifest declaration of Legislative intent, and the required mode of narrowly construing exemptions to the Public Records Act, it is manifestly improper to allow the Board of Accountancy to ignore the specific exemption that applies to its operations and instead attempt to over broadly apply exemptions that do not properly apply to the specific

operations of the Board.

All of the exemptions asserted by the Board other than the private information and Social Security Numbers should be disclosed, and the Board admonished to, in the future, limit its exemptions to those actually contained in statute.

**III The Court also erred in over broadly interpreting the Attorney Client and Work Product exemptions to include communications between Board members, records not prepared for or by an attorney, records that were disseminated to 3<sup>rd</sup> parties, and records for which the privilege was waived or which otherwise failed to meet the requirements of properly exempt records, in a manner that broadly extended these exemption beyond the narrow construction mandated by statute.**

In this case a crucial consideration is that the records at issue had already been the subject of previous settlement by the BOC with Mr. Clark, a settlement that cost the taxpayers over \$500,000

The Court erred in applying the deliberative process exemption where no current deliberative process existed, and in applying the attorney client privilege broadly to suppress records rather than narrowly limiting it to foster public accountability and disclosure in a matter that had already resulted in the expenditure of over a half a million dollars of public funds

in a settlement agreement. Such a ruling was a thinly veiled attempt to amend clearly established precedent and the limited scope of exemptions the Public Records Act.

The rulings of the Court in this case broadly construed exemptions to suppress the public's legitimate search for the truth behind the Board's "confidential" settlement agreement, an agreement that has already cost the public over a half a million dollars. In so doing the Court failed to effectuate the intent of the PRA in deference to the "bygone philosophy that for an attorney's (or a State Board's) investigations to be effective they must be shrouded in secrecy." See *State v. Pawlyk*, 115 Wn.2d 457, 800 P.2d 338.

While this bygone philosophy is merely outdated in regard to attorney communications, it is patently unreasonable in regard to the communications of Board members of a State agency, especially when a proper and more limited exemption exists that particularly and narrowly covers such investigative records for agencies entrusted with professional discipline in the State of Washington.

The central purpose of the (attorney client privilege) rule is to encourage free and open discussion between an attorney and his client by assuring the client that his information will not be disclosed to others

either directly or indirectly. *State v. Chernevelle*, 99 Wn.2d 309, 316, 662 P.2d 836 (1983).

The privilege does not protect documents prepared for purposes other than communicating with an attorney *Morgan v. City of Federal Way*, 166 Wn.2d 747, 755, 213 P.3d 596 (2009).

In the present case the Court erred in over broadly applying the privilege to documents which were not created by or sent to counsel and/or which were not properly within a narrow construction of the exemption.

The primary problem with the use of the Attorney-client exemption in this case is that the majority of the communications did not concern an existing controversy and were not created by or sent to counsel. A large proportion of the communications are between the CEO and board members of a State Agency, which are not subject to attorney client protection. Thus communications appearing in the exemption log and referenced in West's declaration at CP 88 and Motion to reconsider at CP 85-87 are not subject to any reasonable assertion of the attorney client exemption. As the Courts have repeatedly held...

RCW 5.60.060(2) provides that the attorney-client privilege applies to communications and advice between attorney and client. The

privilege extends to written communications from an attorney to his client. *Victor v. Fanning Starkey Co.* 4 Wn. App. 920, 486 P.2d 323 (1971). However, the privilege does not extend to communications that are not made by or sent to counsel, like the majority of the records at issue in this present case. As Both Supreme Courts have recognized, in regard to such documents that have not been prepared by counsel...

The document in question here, exhibit 82, shows neither a communication from or advice by attorneys to Western Gear. It was prepared by a lay person, not a lawyer. As noted by the Court of Appeals, on its face it is nothing more than a memorandum between corporate employees transmitting business advice rather than a privileged communication between attorney and client. Defendant's contention that *Upjohn v. U.S.*, 449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981), applies to this case is not well taken. In *Upjohn*, the documents involved were communications from the corporation's counsel to corporation employees. That was not the situation here. *Kamerrer v. Western Gear Co.*, 96 Wn.2d 416, 635 P.2d 708.

Similarly, the communications between BOC employees in this case, many of which were produced by BOC employees, and merely forwarded subsequently to counsel are not protected. The Court erred in suppressing E-mails that had not been produced by BOC counsel, and records which had been produced by consulting Board members, consultants or disclosed to third parties.

Merely forwarding these type of communications to the attorney

does not convert them to exempt records, especially when their disclosure is waived by defendants by disclosure of related subject matter or by the transmission of the records to third parties, as is the case in this matter. Thus the ~~following~~ records are also not subject to a proper claim of Attorney-Client exemption.

In this case, the Court erred in over broadly applying the attorney client and related exemptions to suppress a search for the truth underlying the facts and circumstances surrounding the \$500,000 settlement paid by the BOC to Mr. Clark..

Even in regard to the records produced by or for counsel, the Court erred in over broadly applying the claimed exemption in a manner that undermined the people's legitimate right to know why the BOC's procedures were so defective as to precipitate a situation where the board was compelled to enter into a half a million dollar settlement agreement with Mr. Clark.

Washington's attorney-client privilege is set forth in RCW 5.60.060 (2)(a).«28»The attorney-client privilege applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication. *Dietz* , 131 Wn.2d at 842 . Because the privilege sometimes results in the exclusion of evidence

otherwise relevant and material, and thus may be contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege is not absolute; rather, it is limited to the purpose for which it exists. *Dietz* , 131 Wn.2d at 843 ; *see also Baldrige v. Shapiro* , 455 U.S. 345, 360, 102 S. Ct. 1103, 71 L. Ed. 2d 199 (1982) (Statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth.). *VersusLaw, Inc. v. Stoel Rives, L.L.P.*, 127 Wn. App. 309 (2005)

Our court noted the following limitation on the attorney-client privilege in *Dike v. Dike*, 75 Wn.2d 1, 11, 448 P.2d 490 (1968):

" As the privilege may result in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolute; but rather, must be strictly limited to the purpose for which it exists.

The decision to exempt public documents as attorney work product presents a mixed question of law and fact. *See Limstrom v. Ladenberg*, 136 Wn. 2d 595, at 613, 963 P.2d 869, (1998), at 606 . The definition of work product is a question of law that we review de novo. RCW 42.17.340 (3); *see Limstrom* , 136 Wn.2d at 606 . But whether a particular document falls within the definition of work product under that interpretation is a finding of fact. *Dawson v. Daly* , 120 Wn.2d 782 , 792,

845 P.2d 995 (1993).

In this case the Court erred in upholding the court's findings that the records were privileged under attorney client when substantial evidence did not exist demonstrating that they had been prepared by counsel or otherwise fit within a narrow reading of the exemption. See *Org. to Pres. Agric. Lands v. Adams County* , 128 Wn.2d 869 , 882, 913 P.2d 793 (1996). *Dawson v. Daily* , 120 Wn.2d at 789 -90, (We construe the disclosure provisions of the public disclosure act broadly and the exemptions narrowly.)

In regard to Work Product, the legal and factual analysis is equally unfavorable to the Board.

The attorney work product doctrine first appears in *Hickman v. Taylor* .It is intended "to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." *United States v. Adlman* , 134 F.3d 1194, 1196 (2d Cir. 1998) (quoting *Hickman v. Taylor* , 329 U.S. 495, 510-11, 67 S. Ct. 385, 91 L. Ed. 451 (1947)). The *Hickman* doctrine is now codified in the civil rules at Fed. R. Civ. P. 26(b)(3) and Washington's CR 26(b)(4).

[A] party may obtain discovery of documents . . . discoverable . . . and prepared in anticipation of litigation

or for trial by or for another party . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. CR 26(b)(4).

In the instant case, the trial Court erred in extending the Attorney client and work product privileges far beyond the narrow construction mandated by the PRA.

The Board's over broad use of attorney client exemption to withhold scores of records violates the requirement that the construction of exemptions be narrow, even as recognized by the Hanggartner court. as the majority noted in Hanggartner...

Indeed, in this case, even though Hanggartner made requests that he referred to as "voluminous," the City claimed that only six documents, three of the light rail documents and three AIA documents, fell within the attorney-client privilege. HCP at 27; *see* HCP at 417.

The dissent in Hanggartner aptly recognized the danger of an over broad interpretation of the attorney client exemption, that it would swallow up the purpose of the Public Records Act.

Here, the majority does not incorporate a narrow exemption of specific information or records into the PDA, but rather incorporates the extremely general attorney-client privilege which swallows the PDA's purpose of allowing citizens a right to public records. The holding is, to

use a word from the majority opinion, absurd.

This “swallowing” is demonstrated in the present case, where the Board failed to even attempt to assert the limited exemption actually applicable to its activities, and where the Court's review of the attorney client exempt records was perfunctory at best.

The Court erred in approving each and every Attorney Client exemption asserted, without specific findings and (apparently) without any reasonable and specific review, when the records that were exempted were not properly subject to the attorney client privilege, when the privilege had been waived and/or when over broad use of the attorney-client privilege to conceal records properly public was a regular practice.

#### **STANDARD OF REVIEW**

The standard of review is de novo, with findings of facts and conclusions of law reviewed under the substantial evidence and error of law standards.

#### **CONCLUSION**

While it should be a matter of simple semantics that the Board of Accountancy is subject to public accountability, this apparently is not the case, even in circumstances where the public has a legitimate right to inquire why a 500,000 settlement was justified as a result of the Board's disciplinary actions. Obviously, the people of the State of Washington have a legitimate interest in accountability concerning the facts and circumstances of the conduct of a State Board that has resulted in a half a million dollar settlement with a former subject of their activities on behalf of the public.

The Board of Accountancy's actions in this case have already cost the public over a Half a Million Dollars in the legal settlement to Mr. Clark alone, irregardless of the other related expenses borne by the public as a consequence of the Board's questionable actions. The public has a legitimate and overriding right to know the real facts behind this matter, for which any reasonable claim of an ongoing deliberative process vanished years ago. If the Board's actions were appropriate and proper, as they publicly assert, they should have no objection to disclosure of the records underlying these actions.

This court should remand with instructions to vacate the order of dismissal overturn the claimed deliberative process exemptions and for

the Court to make a specific and narrow review of the attorney client and work product exemptions asserted. Costs fees and penalties should be awarded for all of the withheld documents.

Respectfully submitted January 9, 2011. ~~S/Arthur West~~  
ARTHUR WEST

**CERTIFICATE OF SERVICE**

I certify this document was mailed or delivered to counsel for the State and Boaed of Accountancy at their address of record on January 9, 2011.

Done January 9, 2011. ~~S/Arthur West~~  
ARTHUR WEST

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STATE OF OREGON  
BY \_\_\_\_\_  
DEPUTY

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
PECOS DIVISION

**FILED**  
MAR 25 2011  
CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY PLO  
DEPUTY CLERK

DIANA ASGEIRSSON, et al.  
Plaintiffs,

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v.

P-09-CV-59

GREG ABBOTT, Texas Attorney  
General, and THE STATE OF TEXAS,  
Defendants.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On November 23, 2010, this case was tried before this Court. The following findings are now issued in accordance with Federal Rule of Civil Procedure 52(a).

**I. INTRODUCTION**

**A. Rangra v. Brown Procedural History**

1. At the outset, Plaintiffs and Defendants stipulate that the substantive legal issues of this case are the same as those tried before this Court in *Rangra v. Brown* (“*Rangra I*”), No. P-05-CV-075, 2006 WL 3327634 (W.D. Tex. Nov. 7, 2006), *rev’d*, 566 F.3d 515 (5th Cir. 2009), *vacated by* 576 F.3d 531 (5th Cir. 2009) (granting rehearing en banc), *appeal dismissed as moot*, 584 F.3d 206 (5th Cir. 2009) (en banc).

2. On February 17, 2005, the Brewster County Grand Jury indicted Alpine, Texas city council members Avinash Rangra and Katie Elms-Lawrence for violating the criminal provisions of the Texas Open Meetings Act (“TOMA”). *Id.* at \*2-3. The indictment was based upon an exchange of e-mails between Mr. Rangra, Ms. Elms-Lawrence, and two other Alpine City Council Members that allegedly constituted a closed meeting under TOMA. *Id.* Mr. Rangra and Ms. Elms-Lawrence

Amendment: “The freedom of speech . . . which [is] secured by the First Amendment against abridgment by the United States, [is] among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State.” *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (plurality opinion) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940)).

11. Plaintiffs’ challenge to TOMA’s criminal provisions implicates two competing rights: the city council members’ right to freedom of speech versus the Texas citizen’s right to open government. This Court finds that a Texas citizen has – at the minimum – a significant right, if not a fundamental right, to open government because “a major purpose of [the First] Amendment [is] to protect the free discussion of government affairs.” *Burson*, 504 U.S. at 196 (plurality opinion) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)) (internal quotation marks omitted). “For speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. La.*, 379 U.S. 64, 74-75 (1964). Because the First Amendment protects free discussion of government affairs, and this free discussion is suppressed when city council members close their meetings to the public, this Court must examine the right to open government and, in turn, open meetings.

12. Content-based speech prohibitions receive strict scrutiny from courts determining a statute’s constitutionality. *Republican Party of Minn. v. White*, 536 U.S. 765, 774-775 (2002). However, content-neutral statutes that minimally affect speech rights are examined under intermediate scrutiny. *Serv. Emp. Int’l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010). Plaintiffs argue that TOMA is not a valid time, place, and manner regulation of their free speech rights because it is content-based. In response, Defendants argue that TOMA is a disclosure law that is content-

neutral because it requires disclosure of speech, not suppression.

13. The difficult task this Court faces, then, is determining the proper balance between the city council members' constitutional right to freedom of speech and the Texas citizen's right to open meetings. "[Texas] citizens are entitled to more than a result. They are entitled not only to know what government decides but to observe how and why every decision is reached. The explicit command of the statute is for openness at every stage of the deliberations." *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 300 (Tex. 1990). Also, City council members certainly do not lose their right to political expression once they attain public office. *Bond v. Floyd*, 385 U.S. 116, 135 (1966) ("[F]or while the State has an interest in requiring its legislators to swear to a belief in constitutional processes of government, surely the oath gives it no interest in limiting its legislators' capacity to discuss their views of local or national policy.").

14. This interest in ensuring that all U.S. citizens have access to their government has inspired each of the fifty states to enact open meetings laws. *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch.*, 332 N.W.2d 1, 5 (Minn. 1983) (en banc). No court, including any Texas court, has ever concluded that an open-meetings law is subject to strict scrutiny. See, e.g., *Hays Cnty. Water Planning P'ship v. Hays Cnty., Tex.* 41 S.W.3d 174, 181-82 (Tex. App. – Austin 2001, pet. denied) ("[W]e see no restriction of the right of free speech by the necessity of a public official's compliance with the Open Meetings Act when the official seeks to exercise that right at a meeting of the public body of which he is a member."); *Sandoval v. Bd. of Regents of the Univ.*, 67 P.3d 902, 907 (Nev. 2003) (per curiam) (concluding that Nevada's statute did not violate the First Amendment because public officials "are free to speak on any topic of their choosing, provided they place the topic on the agenda"); *Cole v. State*, 673 P.2d 345, 350 (Colo. 1983) (per curiam); *St. Cloud Newspapers*, 332

N.W.2d at 7-8; *State ex rel. Murray v. Palmgren*, 646 P.2d 1091, 1099-1100 (Kan. 1982); *People ex rel. Difanis v. Barr*, 414 N.E.2d 731, 739 (Ill. 1980).

15. The Supreme Court has reasoned that “[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Hill v. Colorado*, 530 U.S. 703, 719 (2000) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (internal quotation marks omitted). Also, a content-neutral restriction must not “create[] distinctions between favored speech and disfavored speech” or create a “substantial risk of eliminating certain ideas or viewpoints from the public forum.” *Serv. Emp. Int’l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010) (quoting *Horton v. City of Hous.*, 179 F.3d 188, 193 (5th Cir. 1999)). The Supreme Court has also held that “permissible time, place, or manner restrictions may not be based upon either the content or subject matter of speech.” *Consol. Edison Co. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 536 (1980). Today, this Court does not stray from these axioms. This Court agrees with Defendants and applies an intermediate scrutiny analysis because this Court finds that TOMA does not unconstitutionally ban speech. Rather, this Court finds TOMA to be a proper time, place, and manner regulation. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986).

16. Justice Brandeis wrote “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” L. Brandeis, *Other People’s Money* 62 (National Home Library Foundation ed. 1933). In the spirit of Justice Brandeis’s advice, this Court finds the criminal provisions of TOMA content-neutral because: (1) TOMA is viewpoint neutral – the regulation does not prohibit certain speech because

of the ideas expressed; (2) TOMA does not prevent speech from reaching the “Marketplace of Ideas;” (3) TOMA can be justified by a content-neutral purpose that is unrelated to a desire to suppress speech – it combats the undesirable secondary effects of the speech in question; and finally, (4) Defendants aver, and this Court agrees, that TOMA requires disclosure of speech and does not suppress speech.

**(a). Viewpoint Discrimination and the Marketplace of Ideas**

17. This Court begins its analysis of TOMA by looking to viewpoint discrimination. When analyzing viewpoint discrimination, a court must decide whether the government is regulating speech because it disapproves of the ideas expressed. *Serv. Emp. Int’l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010); see *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (“Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”). Also, content-based discrimination “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.” *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188 (2007) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992)).

18. This Court finds that TOMA is not viewpoint-based because it is not based upon a desire to suppress speech. This Court further finds that TOMA is not motivated by any disapproval of the ideas that governmental bodies express. See, e.g., *R.A.V.*, 505 U.S. at 382. TOMA is not based upon political party bias, allowing speech by one group but not another. Also, TOMA does not disfavor certain topics of discussion. Rather, TOMA was created to provide government transparency. See, e.g., *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 300 (Tex. 1990).

19. Finally, this Court finds that speech is not driven from the marketplace of ideas by TOMA’s