No. 42331-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ARTHUR WEST,

Appellant,

v.

WASHINGTON STATE BOARD OF ACCOUNTANCY, STATE OF WASHINGTON,
Respondents

APPELLANT'S REPLY BRIEF

Stephanie M. R. Bird
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501

206-812-3144
Attorneys for Appellant

Contents

I. INTRODUCTION 1

II. COUNTERSTATEMENT OF THE CASE 2

III. ARGUMENT 7

A. The Board Wrongly Claimed "Attorney-Client Privilege" For At Least One Record Where An Attorney Is Neither Author Nor Recipient ..7

B. Binding Precedent Dictates that the Deliberative Process Exemption Claimed by the Board is Inapplicable Here 8

C. The Board Claimed The Work Product Exemption Over-Broadly, Applying it to Records that Were Created in the Usual Course of the Board's Business, Rather than in Anticipation of Litigation 13

D. Mr. West Requests an Award of Attorney Fees and Costs 21

IV. CONCLUSION 21

Cases

Hangartner v. City of Seattle, 151 Wn.2d 439, 452, 90 P.3d 26 (2004) 7
Hearst Corp. v. Hoppe, 90 Wn.2d 123, 132, 580 P.2d 246 (1978). 12
Heidebrink v. Moriwaki, 104 Wn.2d 392, 706 P.2d 212 (1985).....15, 16
In re Det. of Hawkins, 169 Wn.2d 796, 238 P.3d 1175 (2010).....18
Kammerer v. W. Gear Corp., 96 Wn.2d 416, 421, 635 P.2d 708 (1981).....7
Moran v. State, 88 Wn.2d 867, 568 P.2d 758 (1988).....13
Morgan v. City of Fed. Way, 166 Wn.2d 747, 755, 213 P.3d 596 (2009).....8, 16
O'Neill v. City of Shoreline, 170 Wn.2d 138, 147, 240 P.3d 1149 (2010).....7
Peyton v. N.J. Tpk. Auth., 148 N.J. 524, 554-55, 691 A.2d 321 (1997.....16
Progressive Animal Welfare Soc. v. Univ. of Washington, 125 Wn.2d 243, 256, 884 P.2d 592 (1994).....10, 12
Sargent v. Seattle Police Dep't, ___ Wn. App.___, 260 P.3d 1006 (2011) 17
Soter v. Cowles Pub. Co., 162 Wn.2d 716, 758, 174 P.3d 60 (2007).....13
West v. Port of Olympia, 146 Wn. App. 108, 116, 192 P.3d 926 (2008) ..8, 10, 11

Statutes

RCW 18.04.045.....14
RCW 18.04.295.....14
RCW 42.56.030.....12, 15
RCW 42.56.240.....17, 18, 19
RCW 42.56.280.....8
RCW 42.56.290.....1, 13
RCW 42.56.550.....21
RCW 42.56.904.....12
RCW 5.60.060.....1, 7

Rules

CR 26 .....1, 13
RAP 18.1 21

I. INTRODUCTION

In this case, Mr. Arthur West, the Public Records Act ("PRA") (Chapter 42.56 RCW) requestor and the appellant here, is challenging the Washington State Board of Accountancy's withholding of public records on the basis of claimed exemptions for attorney-client privilege[1] (RCW 42.56.290; RCW 5.60.060(2)), work product (RCW 42.56.290; CR 26(b)(4)), and deliberative process (RCW 42.56.280). The Board claimed the work product exemption and the deliberative process exemption to jointly apply to a large set of records.

As to these records, caselaw is clear: the deliberative process exemption no longer applies because the deliberations and policy formulations are for a matter that already implemented, the Board's decision to investigate and sanction Mr. D. Edson Clark. This decision culminated in Mr. Clark's own public records requests to the Board and

[1] There is at least one record for which the Board claimed attorney-client privilege where it appears from the Board's exemption log that no attorney was involved, whether as author or recipient. This Court should examine this record and hold that the attorney-client privilege does not apply. In addition, if there are any other records for which the attorney-client privilege is claimed but where an examination of the records themselves (as distinguished from the exemption log) shows that no attorney was involved as author or recipient, this Court should hold that attorney-client privilege does not apply to them as well.

his subsequent seven lawsuits against the Board, lawsuits that were settled in October 2009.

And as for the work product exemption, caselaw is also clear that the courts, in determining whether to apply the privilege, should look at the specific parties involved and the expectation of those parties in determining whether the records were created in anticipation of litigation. The Board's exemption log shows that the records for which the work product exemption is claimed are not a uniform set: there are different parties involved with different expectations of confidentiality or of the lack thereof. Mr. West, not having the records themselves, can only argue from the exemption log and from the statutes – both in the Public Records Act and in the Accountancy chapter – governing the Board, that many of these records were not created in anticipation of litigation but in the ordinary course of the Board's business and that therefore the work product exemption should not apply. This Court, having the actual records before it, is in the position to conclusively so determine.

II. COUNTERSTATEMENT OF THE CASE

In its Statement of the Case, the Board describes the findings of the Trial Court: "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." Response at 4.

But the records for which the Board claimed the work product exemption and the deliberative process exemption are not a uniform set, nor do they all include a "consulting Board member". Rather, they were created by and for different people with different expectations of confidentiality. That much is clear from the exemption log. The following is a description and listing of the records for which Board claimed the deliberative process and work product exemptions, grouped according to the identifying characteristics on the Board's exemption log:

1) <u>Emails between or among Board Staff alone (Sweeney, Sexton, Sadler, Briggs, Bren)</u>

    a. DEF-02.0000375-378 (CP 128)
    b. DEF-02.0002111-2112 (CP 141)
    c. DEF-02.0000161 (CP 143)
    d. DEF-02.0000200-202 (CP 143)
    e. DEF-02.0000203-205 (CP 143)
    f. DEF-02.0000206 (CP 144)
    g. DEF-02.0000207 (CP 144)
    h. DEF070000116-117 (CP 152)
    i. DEF070000137-138 (CP 152)
    j. DEF070000139 (CP 152)
    k. DEF070000144-147 (CP 153)
    l. DEF070000148-149 (CP 153)
    m. DEF070000154 (CP 153)
    n. DEF070000155-156 (CP 153)
    o. DEF070000158 (CP 153)
    p. DEF070000165-166 (CP 153)

q. DEF070000168-169 (CP 153)
r. DEF070000171-172 (CP 154)
s. DEF070000196 (CP 154)
t. DEF070000204 (CP 154)
u. DEF070000209-210 (CP 154)
v. DEF070000239-246 (CP 154)
w. DEF070000250-259 (CP 154)
x. DEF070000260-269 (CP 154)
y. DEF070000270-271 (CP 154)
z. DEF070000280 (CP 155)
aa. DEF070000281-282 (CP 155)
bb. DEF070000283 (CP 155)
cc. DEF070000284-285 (CP 155)
dd. DEF070000289-290 (CP 155)
ee. DEF070000291-292 (CP 155)
ff. DEF070000309-311 (CP 155)
gg. DEF070000312-314 (CP 155)
hh. DEF070000315-316 (CP 156)
ii. DEF070000340 (CP 156)
jj. DEF070000397 (CP 158)
kk. DEF070000398-399 (CP 158)
ll. DEF070000401 (CP 158)
mm. DEF070000403-411 (CP 158)
nn. DEF070000417-418 (CP 159)
oo. DEF070000419-420 (CP 159)
pp. DEF070000421 (CP 159)
qq. DEF070000422 (CP 159)
rr. DEF070000426 (CP 159)
ss. DEF070000436 (CP 159)
tt. DEF070000437 (CP 159)
uu. DEF070000444 (CP 160)
vv. DEF070000452-453 (CP 160)
ww. DEF070000460-462 (CP 160)
xx. DEF070000463-464 (CP 160)
yy. DEF070000711 (CP 161)
zz. DEF070000712-713 (CP 161)
aaa. DEF070000714-715 (CP 161)
bbb. DEF070000716 (CP 162)
ccc. DEF070000723-724 (CP 162)
ddd. DEF070000733-734 (CP 162)
eee. DEF070000741 (CP 162)

fff. DEF070000749 (CP 162)
ggg. DEF070000864-865 (CP 164)
hhh. DEF070000866-867 (CP 164)
iii. DEF070000868 (CP 164)
jjj. DEF070000869-871 (CP 164)
kkk. DEF 070000872-874 (CP 164)

2) Correspondence to or from a Consulting Board Member

a. DEF-02.0000369-372 (CP 128)
b. DEF-02.0000364-368 (CP 129)
c. DEF-02.0000358-363 (CP 129)
d. DEF-02.0000358-363 (CP 129)
e. DEF-02.0000307 (CP 129)
f. DEF-02.0000308 (CP 129)
g. DEF-02.0003886 (CP 131)
h. DEF-02.0003891 (CP 131)
i. DEF-02.0003487, 3487A (CP 133)
j. DEF-02.0002657-2659 (CP 134)
k. DEF-02.0002660-2662 (CP 134)
l. DEF-02.0002113 (CP 141)
m. DEF-02.0002072-2073 (CP 142)
n. DEF-02.0002070-2071 (CP 142)
o. DEF-02.0000196-199 (CP 143)
p. DEF070000402 (CP 157)
q. DEF070000413-415 (CP 158)
r. DEF070000823 (CP 163)
s. DEF070000824 (CP 163)

3) Copies of records elsewhere released with redactions

a. DEF-02.0003468 (CP 133); *cf.* DEF-02.0002629 (CP 134)

4) List with heading: Smith Bunday Berman Britton, P.S.

a. DEF-02.0000269 (CP 144)

5) Correspondence between Board Staff and Board Member, without the designation "Consulting Board Member"

   a. DEF-03.00000053-54 (CP 146)
   b. DEF-03.00000056 (CP 146)
   c. DEF-03.00000166-167 (CP 147)
   d. DEF-03.00000200 (CP 147)
   e. DEF-03.00000250 (CP 148)

6) Correspondence to Clark

   a. DEF070000130-131 (CP 152)
   b. DEF070000134-135 (CP 152)
   c. DEF070000140-141 (CP 153)

7) Record for which author had a strong expectation of confidentiality, designated: "CONFIDENTIAL NOT PUBLIC RECORD – WORK PRODUCT"

   a. DEF070000325-328 (CP 156)
   b. DEF070000337-339 (CP 156)
   c. DEF070000337-339 (CP 156)
   d. DEF070000341-346 (CP 156)
   e. DEF070000350-355 (CP 156)
   f. DEF070000364-368 (CP 157)
   g. DEF070000369-374 (CP 157)
   h. DEF070000369-374 (CP 157)
   i. DEF070000375-379 (CP 157)
   j. DEF070000380-387 (CP 157)
   k. DEF070000388-394 (CP 158)
   l. DEF070000825-829 (CP 164)

8) Record for which author had strong expectation of confidentiality, entitled "DELIBERATIVE WORK PRODUCT – NOT AVAILABLE FOR PUBLIC DISCLOSURE"

   a. DEF070000465 (CP 160)
   b. DEF070000486-487 (CP 160)
   c. DEF070000488 (CP 161)
   d. DEF070000489-490 (CP 161)

e. DEF070000491-710 (CP 161)
f. DEF070000717-722 (CP 162)
g. DEF070000750 (CP 163)
h. DEF070000757-758 (CP 163)
i. DEF070000765-767 (CP 163)

III. ARGUMENT

"Our broad PRA exists to ensure that the public maintains control over their government, and we will not deny our citizenry access to a whole class of possibly important government information." O'Neill v. City of Shoreline, 170 Wn.2d 138, 147, 240 P.3d 1149 (2010). By asserting "work product" for records that include those produced in the ordinary course of the Board's business, rather than in anticipation of litigation, and by asserting "deliberative process" for records concerning matters long ago implemented and concluded, the Board denied our citizenry access to a whole class of possibly important government information, as did the Trial Court.

A. The Board Wrongly Claimed "Attorney-Client Privilege" For At Least One Record Where An Attorney Is Neither Author Nor Recipient

> The attorney-client privilege protects " 'communications and advice between attorney and client.' " Hangartner v. City of Seattle, 151 Wn.2d 439, 452, 90 P.3d 26 (2004) (quoting Kammerer v. W. Gear Corp., 96 Wn.2d 416, 421, 635 P.2d 708 (1981)); RCW 5.60.060(2)(a). This privilege "does not protect documents that are prepared for some other purpose than communicating with an attorney." Hangartner, 151 Wn.2d at 452, 90 P.3d 26.

Morgan v. City of Fed. Way, 166 Wn.2d 747, 755, 213 P.3d 596 (2009). Here, the Board claimed "attorney-client privilege" for at least one record on its exemption log where there is no attorney listed as either author or recipient: DEF-02.0003538, "3/9/99 letter to Consulting Board Member from Dana M. McInturff [Executive Director of the Board]." CP 133. This Court should examine this record, hold that the claimed attorney-client privilege does not apply, and should reverse the Trial Court. Further, in the event that this Court determines any other records for which the Board has claimed the attorney-client privilege do not actually implicate communications and advice between attorney and client, this Court should likewise reverse the Trial Court.

B. Binding Precedent Dictates that the Deliberative Process Exemption Claimed by the Board is Inapplicable Here

"The PRA 'is a strongly worded mandate for broad disclosure of public records.' The legislation had its origins in an initiative put forth by Washington citizens. The legislature clearly intended that exemptions to disclosure should be narrowly construed." West v. Port of Olympia, 146 Wn. App. 108, 116, 192 P.3d 926 (2008) (internal citations and references omitted). Yet here, in asking this Court to, variously, overturn Division One caselaw interpreting the deliberative process exemption, RCW 42.56.280 (*see* Response at 24, "the [Supreme Court's statement of the

law concerning the deliberative process exemption] 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") or, alternatively, to distinguish Division I and Supreme Court caselaw by making an excessively nice distinction between "records relating to contract negotiations" and "deliberations of prosecutors making strategy decisions in adjudicative proceedings" (Response at 24), the Board is asking this Court to very broadly construe the deliberative process exemption to disclosure.

The Board argues that the documents at issue here "formulate prosecution strategy in particular disciplinary cases" and that they include "consulting Board member memos contributing to the formulation of prosecution strategy" (Response at 22).[2] As such, the Board asks this Court to affirm the Trial Court's holding that the records are exempt from disclosure under the deliberative process exemption *and* to affirm the Trial Court's holding, contrary to caselaw, that "materials prepared by the

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[2] Here, the issue is not whether the records for which the Board is claiming deliberative process exemption actually would have been protected by that exemption at one time; the issue is whether they still are protected. But it bears noting that nowhere in the Board's exemption log is there any mention of "consulting Board member memos" (Response at 22). Rather, the records concerning a Consulting Board Members are items of correspondence, either written by or to a Consulting Board Member. Mr. West has found no "memos" on the exemption log. *See* above at 5.

Board's prosecution team in preparation for disciplinary cases remain exempt under the deliberative process exemption, even after the conclusion of those cases." Response at 25.

This is contrary to law. Our Supreme Court has held: "[o]nce the policies or recommendations are implemented, the records cease to be protected under [RCW 42.56.280]." Progressive Animal Welfare Soc. v. Univ. of Washington, 125 Wn.2d 243, 256, 884 P.2d 592 (1994) ("PAWS"). Division One has held: ""once the agency implements the policies or recommendations such records are no longer exempt under the deliberative process exemption. Here, since the lease was executed prior to the records requests, documents relating thereto were no longer covered by this exemption." West, 146 Wn. App. at 117. Both PAWS and West are on point. The Board argues that the records at issue were prepared by the Board's prosecution team in preparation for disciplinary cases, and admits that those cases have been concluded. Since the cases are concluded, the records are no longer exempt under the deliberative process exemption.

Indeed, the Board seems to argue that releasing the records now would hinder the Board's ability to carry out its ongoing responsibility to discipline members of the CPA profession in the future. *See* Response at 25. This argument was considered – and rejected – by Division One.

> Here, the trial court extended [the] reasoning [of The American Civil Liberties Union of Washington (ACLU) v. City of Seattle, 121 Wn. App. 544, 89 P.3d 295 (2004)] to the Port [of Olympia] because the Port was constantly involved in the process of negotiating leases with different tenants. The trial court reasoned that although the Port's negotiations with Weyerhaeuser for this particular lease were complete, public disclosure of certain documents might adversely impact the Port's ability to get the "best deal" in future negotiations. For instance, the Port could be disadvantaged in future lease negotiations if the other party knew what terms or provisions the Port may be willing to deviate from in its standard lease.

West, 146 Wn. App. at 118. Division One held that even though the Port would be negotiating future leases, the records concerning the lease at issue were only protected until the implementation of the lease. Likewise, in this case, any records that concern the formulation of prosecutorial strategy for any given disciplinary proceeding are not protected once the proceedings commence and certainly not years after the proceedings conclude.

The justification for this is plain.

> The people of this state do not yield their sovereignty to the agencies that serve them. They people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030. Having created the Board of Accountancy, the people of Washington insist on being informed so that they may maintain control over this board that has the power to regulate and discipline CPAs.

As support for its argument that this Court should affirm the Trial Court in ignoring the precedent of West and PAWS, the Board cites to federal FOIA caselaw and to caselaw from this state – Hearst Corp. v. Hoppe -- that not only precedes PAWS by some twenty years and West by thirty years, but is entirely consistent with PAWS and West. "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." Hearst Corp. v. Hoppe, 90 Wn.2d 123, 132, 580 P.2d 246 (1978). Further, the Board ignores the fact that West was decided four years ago and PAWS 18 years ago. If PAWS and West were wrongly decided or should be limited to the narrow class of records at issue, "pink sheets" in PAWS and records relating to a lease in West, our legislature has had ample time to amend the statute to correct any such error or to clarify construction, as it has done before. *See, e.g.*, RCW 42.56.904.

Even if the Board were correct in arguing that the deliberative process exemption is insufficient, it would be up to the legislature to

amend RCW 42.56.280. "[E]very exemption included in the public disclosure act, chapter 42.56 RCW, results from a deliberate weighing of competing interests by the legislature, and it is the legislature's province to amend a statute, not this court's" Soter v. Cowles Pub. Co., 162 Wn.2d 716, 758, 174 P.3d 60 (2007) (Madsen, C.J., concurring). "We must always remember that we are not a super legislature. It is not our role in government to enact legislation or to add provisions or to change provisions in legislation which are otherwise clear." Moran v. State, 88 Wn.2d 867, 875, 568 P.2d 758 (1988).

This Court should reverse the Trial Court and should conclude that the deliberative process exemption does not apply to the records for which the Board is claiming the exemption, since the recommendations and opinions embodied therein have long ago been adopted by the Board when the Board commenced disciplinary proceedings.

C. The Board Claimed The Work Product Exemption Over-Broadly, Applying it to Records that Were Created in the Usual Course of the Board's Business, Rather than in Anticipation of Litigation

The Board claimed the work product exemption, RCW 42.56.290 and CR 26(b)(4), for multiple broad categories of records. Mr. West challenges this exemption.

The Board is an agency that regulates CPAs, conducts investigations of CPAs under RCW 18.04.045(7), and disciplines them under RCW 18.04.295. In disciplining CPAs, the Board may enter into stipulated agreements and orders of assurance with them, may certify the facts to the prosecuting attorney for criminal prosecution, and may itself institute proceedings under the Administrative Procedures Act, chapter 34.05 RCW. RCW 18.04.045(10). The Board thus wears multiple hats. Richard C. Sweeney, Executive Director of the Board, explains:

> 6. Pursuant to Board procedures, when a complaint against a certified public accountant (CPA) is received, in my role as Executive Director and head of the prosecutorial team for disciplinary cases, I assign complaints that allege violations of the Public Accountancy Act or Board rules to an investigator for further investigation.
>
> 7. Based on the findings of the investigator, I assign a Consulting Board Member to the case. The role of the Consulting Board Member is to make a recommendation to me and the prosecutorial team whether 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 to minimize prosecutorial costs while meeting the public protection mandate and, if so, what sanctions and/or other remedies should be recommended, or whether the case should be closed. The Consulting Board Member also serves as a professional, expert consultant on the standards of the profession both before and during any adjudicative proceedings.

CP 58. The Board alleges that the broad categories of documents at issue here are protected by the work product privilege because "the minute a

complaint is filed there is a controversy and the Board is in reasonable anticipation of litigation." CP 125. Yet this, on its face, simply cannot be. The Board is a public agency and is accountable to the public, who are entitled to inspect public records so that they may maintain control over the instrumentalities they have created. RCW 42.56.030. It cannot be that the public have no oversight over the Board's investigation and discipline of a CPA, on the basis that the "minute a complaint is filed there is a controversy." Yet – by the same token – the Board is entitled to the confidentiality afforded to it by our statutes and caselaw, confidentiality that is necessary for the Board to do its job. There must be a balance, but the broad-sweeping assertion of the Board's work-product exemption is tilted too far towards secrecy at the expense of openness and disclosure.

The case that is instructive on this point is that of Heidebrink v. Moriwaki, 104 Wn.2d 392,706 P.2d 212 (1985) Heidebrink concerned an insurance company, that, like the Board, wears many hats. "It is difficult in this context to determine whether a document was prepared in anticipation of litigation since an insurance company's ordinary course of business entails litigation. Heidebrink, 104 Wn.2d at 399. The Heidebrink court rejected a "rule of thumb" approach so as to avoid the possibility of "insurers mechanically forming their practices so as to make all documents appear to be prepared in 'anticipation of litigation.'"

Heidebrink, 104 Wn.2d at 400. Instead, the Court held, "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 400.

"To invoke the work product exemption, the records must relate to completed, existing, or reasonably anticipated litigation[]. The work product doctrine does not shield records created during the ordinary course of business. Heidebrink, 104 Wn.2d at 396-97; *see* Peyton v. N.J. Tpk. Auth., 148 N.J. 524, 554-55, 691 A.2d 321 (1997) (holding that an investigation into a hostile work environment claim was likely not work product because it was conducted during the ordinary course of business, not in anticipation of litigation)." Morgan, 166 Wn.2d at 754-55.

The question then becomes, given that the Board's business often involves litigation, when can it be said that a record is created in reasonable anticipation of litigation? Turning back to Heidebrink, the approach the Court found to be the proper one is to look at the specific parties involved and their specific expectations. Mr. Sweeney described, in his declaration, that the Board has "investigators," members of a "prosecutorial team," staff members of the Board, and "Consulting Board Members." Each of these individuals may be involved at a different stage of a case and may be creating records that are either in the ordinary course of the Board's business, in anticipation of litigation, or both.

The Board, in its Response to Mr. West, pooh-poohed Mr. West's reliance on the law enforcement investigation to the Public Records Act, RCW 42.56.240, arguing that the Board did not cite that exemption and so it is not relevant here. *See* Response at 27. But it is very relevant in terms of determining the status of the individuals who are producing the records at issue, and indeed, of their expectations. RCW 42.56.240(1) exempts: "Specific intelligence information and specific investigative records compiled by…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." This exemption lasts only while the investigation is open and active. Sargent v. Seattle Police Dep't, ___ Wn. App.___, 260 P.3d 1006 (2011).

Once a case is charged or referred to prosecution, the exemption ceases to exist to protect the records. RCW 42.56.240 applies on its face to the Board of Accountancy. Thus, it is reasonable to conclude that the investigators, Board Staff, and indeed the Consulting Board Members had the reasonable expectation that any records they created during the investigatory phase of a case would *not be exempt from production* when the investigatory phase of the case concluded and the disciplinary phase began. It is not only reasonable to expect that the Board itself was on

notice, pursuant to RCW 42.56.240, that records created during its investigatory phase would not be protected by the work product exemption, but also to conclude that our legislature expressly considered the work product exemption in enacting RCW 42.56.240 and did not intend the work product exemption to apply to records that – since they were created within the usual course of business and not in anticipation – were created during the Board's investigatory phase. "We presume that the legislature is aware of long-standing legal principles." In re Det. of Hawkins, 169 Wn.2d 796, 802, 238 P.3d 1175 (2010). Courts construe statutes *in para materia.* The Board's interpretation of the work product doctrine is so broad as to render RCW 42.56.240 useless. This is surely not the legislature's intention.

It is hard to tell, from the Board's exemption log, whether any of the records at issue were created during the investigatory phase of any case, which, under Heidebrand and RCW 42.56.240(1), can be fairly characterized as the "usual course of business" of the Board and not in an anticipation of litigation stage. But, for example, there are several staff members who are investigators: Sadler, Briggs, and Bren. In the category of "emails between or among Board Staff alone), emails that were either authored or received by Sadler, Briggs, or Bren, may well be records from the investigation phase, rather than from a discipline stage under the

Administrative Procedures Act. If so, they are not exempt under the work product exemption. Likewise, any other emails between Sweeney and Sexton that date from the investigatory phase, rather than from the moment the Board decided to discipline Mr. Clark, would likewise be not exempt under the work product exemption. This Court should review these records and determine if they were created in anticipation of litigation or with the reasonable expectation, under RCW 42.56.240, that they would be open to disclosure once an investigation was complete.

Another large category of records is "Correspondence to or from a Consulting Board Member." The Board argues, "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." Response at 14. Applying the rationale of RCW 42.56.240 and Sergant, it appears that even these memos – which the Board argues are entitled to the strongest protection of confidentiality – can be fairly said to be firmly within the investigatory phase of any case, rather than "anticipation of litigation," since they are intended to aid the Board in deciding whether to charge a case. It also bears mentioning that the exemption log does not list "memos" anywhere. All the records that concern a Consulting Board Member are instances of correspondence.

This Court should review this category of records and determine whether they were indeed created in "anticipation of litigation" or whether they were intended to aid the Board in deciding whether to charge a case.

Another category of records include drafts of correspondence to Mr. Clark. The Board can have had no expectation of confidentiality as to these records, since they were created with the express purpose of sending them to the very CPA the Board was considering disciplining. These are very likely not work product.

There are two categories of records which, on the face of the exemption log alone, seem likely to fall within the work product rule's ambit. These are records which the author had a strong expectation of confidentiality at the moment of creation, since the author designated the records: "CONFIDENTIAL NOT PUBLIC RECORD – WORK PRODUCT" or "DELIBERATIVE WORK PRODUCT – NOT AVAILABLE FOR PUBLIC DISCLOSURE." Nonetheless, this Court should review these records and determine whether, indeed, they were created in anticipation of litigation or merely within the course of the Board's usual business. For each record that was created within the course of the Board's usual business, this Court should reverse the Trial Court.

D. Mr. West Requests an Award of Attorney Fees and Costs

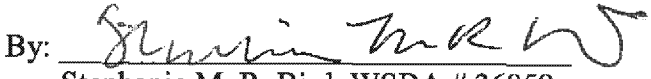
In his complaint and his opening brief, Mr. West properly did not request an award of attorney fees and costs under RCW 42.56.550(4), since he was proceding *pro se*. Now he is represented by counsel, and the time is ripe for him to request fees and costs here on appeal, pursuant to RCW 42.56.550(4) and RAP 18.1. He does so.

IV. CONCLUSION

The exemptions claimed by the Board are too broad-sweeping, since the Public Records Act exemptions must be construed narrowly. This Court should review the records for which the Board has claimed the work product exemption, the deliberative process exemption, and the attorney-client privilege exemption, and should reverse the Trial Court as to each withheld record for which an exemption does not apply.

RESPECTFULLY submitted this 16th day of May, 2012.

CUSHMAN LAW OFFICES, P.S.

By: 

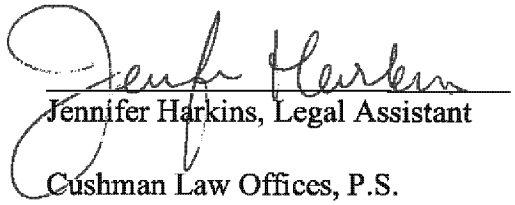
Stephanie M. R. Bird, WSBA # 36859
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2012, I caused to be served a true and correct copy of the foregoing document on the party listed below as follows:

ELECTRONICALLY & VIA LEGAL MESSENGER

Attorneys for Respondent Board of Accountancy
Bruce L. Turcott
Assistant Attorney General
Attorney General of Washington
Licensing & Admin, Law Division
1125 Washington Street SE
Olympia, WA 98504-0110
T: (360) 586-2738
BruceT1@atg.wa.gov



Jennifer Harkins, Legal Assistant

Cushman Law Offices, P.S.
924 Capitol Way S.
Olympia, WA 98501
206-812-3144
360-956-9795 (fax)
jenniferharkins@cushmanlaw.com

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Transmittal Letter

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Case Name: West v. Board of Accountancy
Court of Appeals Case Number: 42331-6

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: __Reply__
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Other: _____

Sender Name: Jennifer Harkins - Email: **jenniferharkins@cushmanlaw.com**

A copy of this document has been emailed to the following addresses:

stephaniebird@cushmanlaw.com
BruceT1@atg.wa.gov