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No. 231364

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

CODY SOTER, a minor child; FRANCIS SOTER and GLENDA CARR,
individually, and as parents of CODY SOTER; THE ESTATE OF
NATHAN WALTERS, a deceased minor child; RICK WALTERS and
TERESA WALTERS, a deceased minor child; and SPOKANE SCHOOL
DISTRICT NO. 81, a Washington municipal corporation,

Respondents.

v.

COWLES PUBLISHING COMPANY, a Washington corporation,

Appellant,

APPEAL FROM SPOKANE COUNTY SUPERIOR COURT

BRIEF OF AMICI CURIAE THE WASHINGTON SCHOOLS RISK
MANAGEMENT POOL, THE WASHINGTON ASSOCIATION OF
SCHOOL ADMINISTRATORS, THE WASHINGTON COUNCIL OF
SCHOOL ATTORNEYS, THE SOUTHWEST WASHINGTON RISK
MANAGEMENT INSURANCE COOPERATIVE, AND THE
WASHINGTON GOVERNMENTAL ENTITY POOL

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I. INTRODUCTION

This appeal concerns a newspaper's blatant attempt to undermine the Supreme Court's ruling last year in Hangartner v. City of Seattle, 151 Wn.2d 439, 90 P.3d 26 (2004) and to erode a public agency's ability to prepare for litigation while protecting its work product from disclosure. Appellant's arguments seek to alter the relationship between Washington public entities and their counsel and should be rejected in their entirety. Similar arguments have already been rejected by both the Washington State Supreme Court and the State Legislature. The trial court's decision appropriately recognized that Washington's public agencies are entitled to candid legal advice and that their work product is protected from disclosure under the Public Records Act, RCW 42.17.250, *et seq.* (commonly known as the "PDA"). It should be affirmed.

II. IDENTITY AND INTEREST OF AMICI

The Washington Schools Risk Management Pool ("WSRMP") is a self-funded group of 77 members comprised of school districts, educational service districts, and interlocal cooperatives in Washington that pool their resources to prevent, control, and pay for liability and property risks. WSRMP retains attorneys to represent its members when they are threatened with a lawsuit or sued. The ability of these attorneys to help WSRMP members assess legal risks, prepare for potential lawsuits,

and respond to claims is directly implicated by the attorney-client privilege and the work product doctrine. Accordingly, the scope of the PDA's exemptions for attorney-client communications and work product are of significant and immediate concern to WSRMP and its members.

The Washington Association of School Administrators ("WASA") is a statewide professional association representing Washington education administrators. WASA has more than 1,450 members, all of whom are educational administrators in central office, building management, and educational agency positions. WASA provides networking and professional development opportunities to its members and WASA is actively involved in legislative activity to ensure that resources are committed to the education and welfare of children. As school administrators, WASA members have a particular interest in ensuring their access to candid legal advice. District administrators must be able to obtain frank legal assessments to determine whether a particular action is in the best interests of the district and its students. WASA members from across Washington will be affected by the Court's ruling in this case.

The Washington Council of School Attorneys ("WCSA") is a non-profit association of approximately 100 attorneys who provide legal advice and representation to the 296 school districts in the State of Washington. WCSA members commonly advise and defend school

districts and their board members and administrators who serve the public interest. As lawyers serving public sector clients, WCSA members create work product and engage in privileged communications daily. WCSA members are keenly aware that protections for such material are critical to maintaining a level playing field in our judicial system for school districts.

The Southwest Washington Risk Management Insurance Cooperative (“SWRMIC”) is a self-funded group with 33 member entities, including school districts, school district cooperatives, and an educational service district. Like WSRMP, SWRMIC retains attorneys to represent its members in litigation matters. SWRMIC members’ ability to assess risk, prepare for potential lawsuits, and respond to claims is directly affected by whether or not privilege applies to their communications with counsel and whether the work product doctrine applies to their efforts. Accordingly, the exemptions for attorney-client communications and work product are of significant and immediate concern to SWRMIC and its members.

The Washington Governmental Entity Pool (“WGEP”) is an unincorporated, not-for-profit, local government risk sharing pool. WGEP was established to provide risk financing to its members, who are special purpose districts and other municipal entities (such as conservation, health, irrigation, park, ports, water, and sewer districts). WGEP assists its 397 members with issues including general liability, automotive

liability, and property damage, and other issues common to public entities. In addition, WGEP aids its members in the defense of employment law cases, specifically wrongful termination claims. WGEP and its members, like the other Amici, have a strong interest in the preservation of the attorney-client privilege for public entities and the protection of their work product from public disclosure in response to a PDA request.

III. STATEMENT OF CASE

The Amici rely upon and adopt the Statement of the Case set forth in the Brief of Respondent Spokane School District No. 81.

IV. ISSUES

Where records sought by a PDA request are classic work product material, created in the context of anticipated litigation and representing a public agency's defense to anticipated claims, may a requestor defeat work product protections with a bare allegation of "need"?

Whether the PDA's exemptions from disclosure for attorney-client privileged communications is supported by sound public policy, as recognized both by the Supreme Court and the State Legislature?

V. SUMMARY OF ARGUMENT

The Supreme Court in Hangartner confirmed that the "other statute" exemption in the PDA includes the statutory attorney-client privilege. 151 Wn.2d 439. Notwithstanding Hangartner, however, there

is no question under established Washington law that public agencies are entitled to withhold from public disclosure work product created in anticipation of litigation. RCW 42.17.310(1)(j). Work product is not subject to disclosure where a requestor merely alleges that it “needs” the materials and cannot otherwise obtain them. Rather, the showing required to defeat work product requires that a party to a case have substantial need of the withheld material for the preparation of its legal claims or defenses. These circumstances are not present in the context of a PDA request.

The protections of the work product doctrine and the attorney-client privilege represent separate and independent bases for withholding documents from disclosure in response to a PDA request. These protections are vital to the members of Amici WSRMP, WASA, WCSA, SWRMIC, and WGEP. The trial court was correct to recognize both doctrines as properly invoked exemptions in this case.

VI. ARGUMENT

A. The Public Records Act Exempts Work Product from Disclosure and the Showing Required to Defeat That Protection Cannot Be Made with a PDA Request.

The PDA’s so-called controversy exemption, RCW 42.17.310(1)(j), exempts from disclosure those “[r]ecords which are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial

discovery for causes pending in the superior courts.” In Dawson v. Daly, the Supreme Court defined “relevant to a controversy” as related to “completed, existing, or reasonably anticipated litigation.” 120 Wn.2d 782, 791, 845 P.2d 995 (1993).

The Supreme Court has explained that this provision “exempt[s] from disclosure public records which are relevant to a controversy and which are the work product of an agency’s attorney. The exemption relies on the rules of pretrial discovery to define the parameters of the work product rule for purposes of applying the exemption.” Limstrom v. Ladenburg, 136 Wn.2d 595, 605, 963 P.2d 869 (1998) (citing cases). Therefore, the PDA’s controversy exemption is coextensive with the work product rule in CR 26(b)(4).

In this case, it is largely undisputed that the materials requested were created by a school district, its representatives, and its counsel in anticipation of litigation arising from the death of a student.¹ Cowles does not seriously contend that the resulting documents are not work product,

¹ In addition to the exemptions under RCW 42.17.310(1), both federal and state law generally prohibit school districts from disclosing a student’s education records without prior written consent from the adult student or his or her parent or legal guardian. See 20 U.S.C. §1242g(a)(4)(A)(i) and (ii); see also RCW 28A.605.030. As “other statutes” that prohibit the disclosure of specific records and information, both 20 U.S.C. §1242(g) and RCW 28A.605.030 operate as an independent basis upon which a

but instead seeks to defeat the protection by claiming that it has need of the withheld material and is unable to obtain it elsewhere.² This argument is misplaced. The PDA incorporates the work product protection as an exemption, but a requestor cannot invoke the hardship exception to the work product rule contained in CR 26(b)(4) to vitiate that protection.

CR 26(b)(4) sets forth the work product doctrine and its exceptions. As relevant here, the rule allows a court to order disclosure of a party's protected work product, in the context of an active lawsuit, if the material is essential to the seeking party's ability to prove its claims and if the party cannot obtain the information from other sources. For example, while an attorney's interview notes from a conversation with a witness would ordinarily be protected from discovery, under some circumstances a court may order the production of the attorney's notes (redacted for mental impressions and legal strategy) where the other party cannot interview the witness and the witness' testimony is crucial to the claims at issue (e.g.,

school district may deny a request that seeks to education records without prior written consent. See RCW 42.17.260(1).

² To the extent Cowles suggests that the work product rule does not protect materials developed in anticipation of claims that subsequently settle without litigation, this argument is foreclosed. See, e.g., Limstrom, 136 Wn.2d at 613 (for purposes of the work product rule, “[w]e do not distinguish between completed and pending cases.”).

the sole eyewitness dies). Such circumstances are not presented by a PDA request.

Undeniably, the showing required in civil litigation to defeat work product protection requires both a party and the preparation of a case, neither of which apply in the context of a PDA request. Specifically, CR 26(b)(4) provides in relevant part that a “*party* may obtain discovery” of work product “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.” A PDA requestor, who is not a party to litigation with the public agency for the purpose of evaluating the request, by definition cannot demonstrate that the requested material is necessary “to the preparation of his case.”³ Indeed, the trial court explicitly recognized that the work product

rule was intended to be used by parties who have litigation against one another, and because of that have a need for the information to present their position in the litigation.

³ To the extent that Limstrom suggests that a PDA requestor might defeat work product by showing substantial need of the material, the reference is dicta. See 136 Wn.2d 614-15 (by definition, requestor could not demonstrate a substantial need for materials he had already obtained from other sources). See also Kleven v. King County Prosecutor, 112 Wn. App. 18, 25, 53 P.3d 516 (2002) (PDA request for work product material was without merit where allegation of need was merely that requestor did not already have the documents).

And one party uniquely has all of the information. There is no way to get at it. The other party needs it. That's a different matter than what we have here in the Public Disclosure Act.

Report of Proceedings, 90-91.

This conclusion is soundly supported. CR 26(b)(4) was designed to protect an entity's preparation for litigation, with a narrow provision for disclosure when no other source of information on a critical aspect of a claim is available to a party who is embroiled in a lawsuit. Where an individual has need of another's work product for the preparation of a court case, the individual can make CR 26's required showing in the context of that pending lawsuit, with subpoena powers available to compel material from third parties if necessary. Without a lawsuit, the provisions allowing for disclosure of a party's work product simply do not apply.

Thus, Cowles cannot defeat the protections for the School District's work product by alleging that it has substantial need for the materials withheld. This conclusion, which is consistent with the language of the work product rule itself, is also consistent with the construct and intent of the PDA. For example, as Cowles repeatedly notes, the PDA instructs public agencies that they may not distinguish between requestors or inquire as to the purpose of a request. See RCW 42.17.270 ("Agencies shall not distinguish among persons requesting records, and such persons

shall not be required to provide information as to the purpose for the request ...”). Thus, the statute itself precludes the inquiry that Cowles urges here – the evaluation of a requestor’s “need” for the material requested. Such an undertaking would violate both the letter and the spirit of the PDA. There is simply no authority for treating requestors differently based upon their asserted need for public records.

A school district is entitled to withhold its work product under the PDA and a requestor cannot defeat this protection by claiming to “need” the exempt material. Like its broad challenge to the attorney-client privilege, discussed below, Cowles’ attempt to export the exception from CR 26(b)(4) and apply it in this context should be rejected as fundamentally contrary to the PDA.

B. The Public Records Act Recognizes the Attorney-Client Privilege for Public Agencies and Exempts Attorney-Client Communications from Disclosure.

The Washington Supreme Court has explained the importance of the attorney-client privilege, codified at RCW 5.60.060(2)(a):

The attorney-client privilege exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery The attorney-client privilege applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication.

Dietz v. Doe, 131 Wn.2d 835, 842, 935 P.2d 611 (1997).

The attorney-client privilege applies to communications between public agencies and legal counsel. Hangartner, 151 Wn.2d at 453. As such, the privilege protects communications reflecting legal advice to public agencies from disclosure under the Public Records Act. In confirming that the privilege applies equally to public agencies, the Supreme Court explained that

The language the legislature used in RCW 42.17.260(1) is clear and plainly establishes that documents that fall within the attorney-client privilege are exempt from disclosure under the PDA.

Hangartner, 151 Wn.2d at 453.

Judicial decisions supporting the protection of attorney-client communications fully comport with sound public policy. For example, WASA members who serve as school administrators must consult with their attorneys in order to transact school district affairs both lawfully and in the best interests of the public that they serve. Likewise, WCSA members must be able to advise school districts of the legal benefits and risks of taking certain courses of action. Furthermore, each public agency has certain statutory powers, duties, and limitations, such as the power to enter into contracts or the duty to provide services to their constituents. The performance of these powers and duties may give rise to a myriad of legal questions, and candid legal advice is in the public interest.

For example, lawsuits may be filed against WGEP members regarding the scope of their legal authority and the proper exercise of their powers and duties. The potential issues for WGEP members run the gamut, from allegations about sewer backups or faulty sewer installation, property damage claims from broken water lines, or negligence claims concerning park and recreation district facilities. WGEP members need to consult their attorneys when threatened with a lawsuit or sued. The trial judge's ruling properly recognized the value of such communications.

The State Legislature has confirmed that the application of the privilege as a PDA exemption is consistent with Washington's public policy. The Legislature declined to override Hangartner despite ample opportunity to revisit the PDA's exemption for attorney-client communications during the 2005 Legislative Session. After Hangartner was decided, legislators introduced several bills designed to modify the PDA. The most draconian, House Bill 1350, would have eliminated the attorney-client privilege altogether for exemption purposes. This bill and portions of other similar bills were rejected by the Legislature, and Hangartner's holding regarding attorney-client privilege remains intact. As detailed above, the protections of the work product doctrine and the attorney-client privilege are vital to the members of Amici WSRMP, WASA, WCSA, SWRMIC, and WGEP.

C. The Consequences of Derogating the Attorney-Client Privilege or Work Product Protection for Public Agencies Could Be Debilitating.

As the Supreme Court has recognized, “[t]he general purpose of the exemptions to the Act’s broad mandate of disclosure is to exempt from public inspection those categories of public records most capable of causing substantial damage to the privacy rights of citizens or damage to vital functions of government.” Limstrom, 136 Wn.2d at 607 (citing cases). The work product protection and the attorney-client privilege are independent exceptions to disclosure under the Public Records Act:

Once documents are determined to be within the scope of the Public Records Act, disclosure is required unless a specific statutory exemption is available. However, work product of an attorney working for a public agency that is not available to another party under the pretrial discovery rules is exempt from disclosure. In addition, privileged communications between attorney and client are exempt from disclosure.

Kleven v. King County Prosecutor, 112 Wn. App. 18, 20-21, 53 P.3d 516 (2002) (emphasis added). In this case, Cowles seeks the wholesale disclosure of two categories of material that have the strongest potential to damage the vital functions of government in the legal arena: the ability to seek and obtain candid legal advice and the ability to prepare confidential materials for anticipated litigation.

At all times, the free flow of communication between public officials and their attorneys is vital to the proper functioning of government across the whole spectrum of local government endeavors. School administrators and members of WASA must seek and obtain legal advice regarding a full spectrum of issues that could affect their budgets and, thus, the public purse. Examples include contracting matters, construction and maintenance concerns, real property disputes, and personal injury claims. WSRMP, SWRMIC, and WGEP routinely retain attorneys to assist members with legal issues that arise in anticipation of litigation in these and other areas. Likewise, WCSA routinely assesses employee discipline matters, terminations, and other grievances. This process often involves preparing for anticipated statutory hearings or other forms of administrative litigation.

The disclosure of a public agency's requests for legal advice and the counsel received on such matters is not in the public interest. For example, it is an unfortunate reality that school districts are in rare circumstances faced with allegations of teacher wrongdoing, such as when a teacher is accused of abusive or inappropriate conduct towards students. Such teachers are entitled under Chapter 28A.405 RCW, and/or under the applicable collective bargaining agreement, to a hearing to contest whether there is legal cause to suspend or terminate their employment. As with

any other form of anticipated litigation, school districts contemplating such actions often engage attorneys to assess and advise them about the strengths and weaknesses of a claim before they take action. The accused teacher is frequently also represented by legal counsel.

The best interests of the public would not be served by requiring school districts to disclose the work product that school district attorneys (frequently WCSA members) develop in preparing for such administrative litigation. Indeed, to require such disclosure would necessarily allow the teacher's attorney access to the school districts' legal strategy before the hearing, thereby impairing the ability of a school district to address the issues raised by those few teachers who engage in egregious behavior. How would such disclosure serve the public interest?

Similar problems will be created if public entities are required to disclose communications with their lawyers. For example, school districts are required to develop comprehensive safe school plans under RCW 28A.320.125 that identify security risks and evaluate measures to address these risks, such as "periodic drills and testing, evaluations, [and] lockdowns...." Furthermore, schools must take reasonable steps to protect each child in their care from known or foreseeable dangers, whether from the student who brings drugs to school or the malicious stranger who attempts to enter the schoolyard. It is essential for school administrators

to discuss the legal risks and consequences, including constitutional limitations, of protected security measures with legal counsel. It is also absolutely critical that the advice school administrators receive, much of which is written, be candid and complete.

If Hangartner's holding is eroded, the legal evaluation of security risks and possible responses would theoretically be available to the very people who are the source of the concerns. As a result, an attorney's advice to a public client in writing could give an adversary a roadmap of the agency's legal vulnerabilities. Surely, it was never the intent of the Legislature to either stifle candid advice or provide would-be malfeasors with documentation revealing discussions regarding how best to legally address the risks such people present. Indeed, such disclosure would be directly contrary to the public's right to expect safe schools.

Security is but one legitimate public interest that could be compromised if the exemption for privileged communications is not recognized. Hangartner, for example, concerned in part communications regarding how to draft an ordinance that would withstand legal scrutiny. If their interactions would not remain confidential, a public entity could become reluctant to seek legal advice on the proper drafting or interpretation of legislation or a board or commission policy, and their lawyers might limit the candor of their advice. For example, school

districts routinely adopt and amend policies regulating students' rights to free speech and assembly in the school setting. Without access to high quality and confidential legal advice on such important topics, the public could get flawed or poorly implemented policies that fail to pass constitutional muster. This, in turn, could unnecessarily impair student rights or lead to additional litigation and public expense.

As another example, WSRMP insures numerous school districts, educational service districts, and cooperatives. WSRMP provides coverage for the defense of special education hearings and retains attorneys to assist school districts in these cases. Parents of such students are often represented by attorneys in hearings against the school district. As with employee discipline litigation, if documents prepared in anticipation of these administrative processes are disclosed, they give the party adverse to the school district an unfair advantage, negatively affecting the ability of WSRMP member districts to defend themselves.

As yet another example, public agencies routinely obtain legal advice (often written) from outside employment counsel concerning labor negotiations. Most of the time, there will be no pending or threatened dispute on these matters. While RCW 42.30.140(4) exempts from Open Public Meetings Act requirements those meetings at which governing bodies plan for collective bargaining, the public agencies must be able to

rely on the attorney-client privilege to protect from disclosure the written communications between the agencies and their lawyers on the subject. A court could well construe such communications with attorneys to be beyond the exemption from disclosure under the PDA for preliminary intra-agency memoranda per RCW 42.17.310(1)(i). However, it is hardly in the public's or taxpayers' interest to allow public dissemination of these attorney-client communications during a public agency's efforts to evaluate a proposed labor contract. Such disclosures would give labor organizations an unfair advantage during the course of labor negotiations in which communications with **their** own counsel remain confidential.

The same concerns animate the need to protect a public agency's work product: "The specific purpose of the work product exemption is to protect an agency attorney's work product from public disclosure. The work product exemption not only protects the interests of individuals, but also promotes and protects the effectiveness of our adversarial judicial system." Limstrom, 136 Wn.2d at 607-08 (internal citations omitted). As a matter of sound public policy, agencies must be able to investigate confidentially the basis for potential litigation and develop legal strategy without concern that the resulting materials will be disclosed. Faced with a potential claim, administrators at school districts or special purpose districts often work with their attorneys to collect information and to

prepare reports relevant to a potential lawsuit. In order to obtain legal advice, which is necessary to protect the public interest and public dollars, the administrator must be able to investigate and compile sensitive information for legal evaluation without the risk that such material will be available to the general public and to the potential plaintiff.

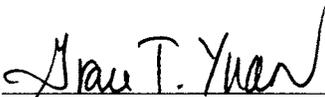
Attorney-client privilege and work product protections secure for public agencies the same ability to seek candid legal advice about potential claims, potential risk and exposure, and the advisability of prompt settlement that private litigants enjoy. The maintenance of these protections is essential to the public agencies represented by Amici.

VII. CONCLUSION

The first issue before this Court is whether written materials developed by a public agency and its attorneys in anticipation of litigation must be disclosed to anyone who asks for them, where the requester claims to have “need” of the material. This contention is contrary to the work product doctrine, to the language and intent of the PDA, and to public policy. The second, equally unfounded, issue presented by this appeal is whether public agencies are categorically excluded from the attorney-client privilege, a contention rejected by the Supreme Court and the Legislature. The decision below should be affirmed.

Respectfully submitted, this 15th day of November, 2005.

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