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(CLERK)
SUPREME COURT OF THE STATE OF WASHINGTON

HON. MICHAEL F. MORGAN, Individually and in his Official Capacity
as Presiding Judge of the Municipal Court of Federal Way,

Appellant,

v.

CITY OF FEDERAL WAY, a code municipality; and the CITY
ATTORNEY FOR FEDERAL WAY,

Respondents,

and

TACOMA NEWS, INC., d/b/a THE NEWS TRIBUNE,

Intervenor/Respondent.

BRIEF OF AMICUS CURIAE ATTORNEY GENERAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

This amicus curiae brief is filed by Robert M. McKenna, Attorney General of the State of Washington, to address issues in this appeal that implicate the Public Records Act, RCW 42.56.

The Attorney General advises state officers and state agencies in interpreting and applying the Public Records Act and, when necessary, represents them in legal actions under the act. The Attorney General also fulfills specific statutory roles in administering the act, including the adoption of Model Rules and the publication of educational materials (RCW 42.56.570), participation in the Sunshine Committee (RCW 42.56.140), and the provision of written opinions concerning certain agency denials of public inspection (RCW 42.56.530). For these reasons, the Attorney General has a significant interest in the scope and construction of the provisions of the Public Records Act.

II. ISSUES ADDRESSED IN THIS BRIEF

This case involves a public records request for a specific record referred to as the Stephson Report. This amicus brief addresses two issues regarding the public disclosability of that report:

- (1) Is the Stephson Report exempt from public disclosure as protected work product?

- (2) Is the Stephson Report exempt from public disclosure as a privileged attorney-client communication?

III. FACTUAL AND PROCEDURAL BACKGROUND

In January 2008, an employee of the Federal Way Municipal Court filed a complaint with the city of Federal Way alleging hostile work conditions in the municipal court. Br. Appellant at 9; Br. Resp't City at 6-7. The city's Anti-Harassment Policy requires prompt investigation of allegations of harassment, so the city can take corrective action. RP (3/19/08-II) at 8:16-18, 12:17-19. Pursuant to that policy, according to the city, the city attorney hired private attorney Amy Stephson to investigate the complaint and asked her to investigate facts, not to provide legal advice. Br. Resp't City at 6-8. Based on the evidence presented at a show cause hearing, the superior court agreed, ruling that the primary or sole purpose of the investigation was for remedial action and not in anticipation of litigation. RP (3/19/08-II) at 14:20-22, 15:17-23. The superior court found that Ms. Stephson was not acting as an attorney in her investigation of the complaint, but as an investigator conducting a fact-based investigation. RP (3/19/08-II) at 10:18-20, 11:4-10. The superior court also found that the Stephson Report contains no legal recommendations or conclusions. RP (3/19/08-II) at

10:24–11:3. Because the Stephson Report was commissioned at the request of the city pursuant to its policy, and was in the possession of the city, and because the request for the report came to the city, the superior court applied the Public Records Act to decide the disclosability of the Stephson Report. RP (3/19/08-II) at 17:14–18.

For purposes of this brief, amicus accepts the findings of the trial court in these respects and the conclusion it reached based on them—that the Public Records Act governs whether the Stephson Report should be publicly disclosed.¹ As the superior court correctly ruled, the report is not exempt under either the work product doctrine or attorney-client privilege.

IV. ARGUMENT

A. **The Stephson Report Is Not Exempt From Public Disclosure As Protected Work Product**

Under the Public Records Act, a public record must be provided for inspection or copying upon request unless nondisclosure is authorized under a statutory exemption. RCW 42.56.070(1). The work product rule is one such exemption, pursuant to RCW 42.56.290, which exempts “[r]ecords that are relevant to a controversy to which an agency is a party

¹ This Court, therefore, need not explore the scope and contours of *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986), since the Stephson Report is not a court record that was requested from a court.

but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts”. See *Soter v. Cowles Publ’g Co.*, 162 Wn.2d 716, 731, ¶ 23, 174 P.3d 60 (2007) (*Soter II*) (quoting statute). Under the work product rule, documents prepared in anticipation of litigation are discoverable only upon a showing of substantial need. *Harris v. Drake*, 152 Wn.2d 480, 486, 99 P.3d 872 (2004). Materials revealing the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party normally are absolutely immune from discovery. *Pappas v. Holloway*, 114 Wn.2d 198, 211, 787 P.2d 30 (1990). Once invoked, the work product rule continues to exempt materials created in anticipation of litigation even after that litigation has terminated. *Soter II*, 162 Wn.2d at 732, ¶ 24 (citing cases).

In *Soter II*, this Court held that investigative materials prepared for a public school district were exempt from public disclosure as work product because the investigation was conducted in reasonable anticipation of specific litigation. *Id.* at 733, ¶26. This case is readily distinguished from *Soter II*. Here, no lawsuit was filed or anticipated when the city attorney hired Ms. Stephson. Rather, Ms. Stephson was hired to conduct an investigation to comply with the city’s Anti-

Harassment Policy, under which the city investigates complaints of harassment and hostile work environment and takes remedial action to prevent harassment *whether or not litigation is anticipated*.² Consistent with the policy, the Stephson Report was not prepared in reasonable anticipation of litigation. It is not work product that would be exempt from public disclosure under RCW 42.56.290.

B. The Stephson Report Is Not Exempt From Public Disclosure As A Privileged Attorney-Client Communication

The attorney-client privilege applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication. *Soter II*, 162 Wn.2d at 745, ¶ 43 (quoting *Pappas*, 114 Wn.2d at 203). The attorney-client privilege does not protect communications that are not intended to be confidential (*Soter v. Cowles Publ'g Co.*, 131 Wn. App. 882, 903, ¶ 57, 130 P.3d 840 (2006) (*Soter I*), *aff'd*, 162 Wn.2d 716, 174 P.3d 60 (2007); *Seattle Nw. Sec. Corp. v. SDG Holding Co.*, 61 Wn. App. 725, 742, 812 P.2d 488 (1991)), or documents that are prepared for purposes other than communications between an

² The policy implemented the protections for employers articulated in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), and summarized in *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 164-65, 991 P.2d 674 (2000). Br. Resp't City at 6-7, 30 (citing RP (3/19/08-II) at 13).

attorney and client to obtain or provide legal assistance for the client (*Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004)). The privilege exists to allow clients to communicate freely with their attorneys without fear of later discovery. *Soter II*, 162 Wn.2d at 745, ¶ 43 (citing *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1997)). As codified in RCW 5.60.060(2), the privilege protects all covered communications and advice between attorney and client, whether or not they are relevant to a controversy. *Soter II*, 162 Wn.2d at 745 n.15 (citing *Hangartner*, 151 Wn.2d at 452).

The superior court found, however, that Ms. Stephson was not acting as an attorney when she conducted her investigation and prepared her report.³ She was not hired to prepare legal theories, plan strategy, or develop legal opinions; she was hired to prepare a factual report regarding the allegations. Br. Resp't City at 6–7; RP (3/19/08-II) at 10:18–11:10. The superior court found that Ms. Stephson did not provide legal analysis or conclusions in her report. RP (3/19/08-II) at 10:24–11:3. The attorney-client privilege does not apply to a person who is a lawyer but is not functioning as an attorney. *Soter I*, 131 Wn. App. at 903–04, ¶ 58 (citing

³ The determination whether an attorney-client relationship exists is a question of fact. *Dietz*, 131 Wn.2d at 844.

In re Fischel, 557 F.2d 209, 211 (9th Cir. 1977) (attorney doing routine tax work)). See also 5A Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 501.15 (2007) (no privilege if the attorney is simply giving business advice).

The Stephson Report was not prepared for the purpose of obtaining or providing legal assistance to a client. As noted above, Ms. Stephson was hired for the purpose of complying with the city's Anti-Harassment Policy. RP (3/19/08-II) at 14:20–22, 15:17–23. She was hired solely to investigate and report on the facts relating to the complaint, so the city would have the factual information necessary to determine what remedial action, if any, should be taken. Neither the city nor Ms. Stephson prepared the report with any expectation or intent that it would be confidential. See Br. Resp't City at 30.

The Stephson Report does not satisfy any element of the test for attorney-client privilege established in RCW 5.60.060(2) and case law.

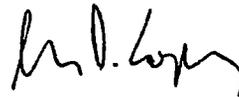
V. CONCLUSION

Because the Stephson Report was not prepared in reasonable anticipation of litigation, it is not exempt work product under RCW 42.56.290. Because Ms. Stephson was not acting as an attorney in

preparing the report, because the report was not prepared for the purpose of obtaining or providing legal advice to a client, and because the report was not intended by Ms. Stephson and the city to be confidential, the Stephson Report is not a privileged attorney-client communication that is exempt under RCW 42.56.290 or RCW 5.60.060(2).

RESPECTFULLY SUBMITTED this 8th day of May 2009.

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