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23-2-00203-24
ORSC 38
Order on Show Cause
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**Superior Court of Washington
County of Okanogan**

METHOW VALLEY CITIZENS COUNCIL,

Plaintiff,

and

OKANOGAN COUNTY,

Defendant.

No. 23-2-00203-24

**Order Granting Plaintiff's Motion
to Show Cause**

This matter comes before this Court on Plaintiff Methow Valley Citizen's Council's ("MVCC") Motion for Order to Show Cause ("Motion") why Defendant Okanogan County ("County") has refused to allow inspection or copying of the requested records ("Document"). The Court has considered the paper and pleadings filed in this matter, including the following:

1. The Motion;
2. The County's Response to the Motion;
3. MVCC's Reply; and
4. The other pleadings and papers on file in this matter.

I. ISSUE

Should the Court find the County has violated the Public Records Act, and order the County to allow inspection or copying of the requested records?

II. RULE AND RELEVANT AUTHORITY

The PRA is a strongly worded mandate for broad disclosure of public records. *Resident Action Council v. Seattle House Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013). A public record includes any writing containing information relating to the conduct of government or the

performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. RCW 42.56.010(3).

An agency must disclose responsive public records “unless the record falls within the specific exemptions of [the PRA] . . . or other statute”. *Kittitas Cnty. v. Allphin*, 190 Wn.2d 691, 701, 416 P.3d 1232 (2018). The County bears the burden of establishing that a particular public disclosure exemption applies. RCW 42.56.550(1).

A record must be created for completed, existing, or reasonably anticipated litigation to be exempt as work product. *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 732, 174 P.3d 60 (2007). Regarding completed litigation, only a record created in anticipation of reasonably anticipated or existing litigation maintains its work product status after the litigation or prospect of litigation has been completed. *Id.*

Records created in the context of “a future hypothetical dispute” are not work product exempt from the PRA. Such an exemption “would frustrate the purpose of the disclosure act to promote complete disclosure of and full access to public records.” *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn. App. 319, 325, 890 P.2d 544 (1995).

The attorney-client privilege protects communications and advice between attorney and client. This privilege does not protect documents that are prepared for some other purpose than communicating with an attorney. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 755, 213 P.3d 596 (2009).

The attorney client privilege does not allow parties to cloak their regular business affairs in secrecy. *Matter of Fischel*, 557 F.2d 209, 212 (9th Cir. 1977). It does not conceal everything said and done in connection with an attorney’s legal representation of the of a client in a matter. *Id.*

In reviewing attorney-client privilege claims over similar government decisions, numerous other jurisdictions have found that documents created and used in the regular course of business for administrative, regulatory, or adjudicatory purposes are not privileged. *See Texaco Puerto Rico, Inc. v. Dep’t of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995); *Nat’l Council of La Raza v. Dep’t of Justice*, 411 F.3d 350, 361 (2d Cir. 2005).

As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach. *Simeonov v. Ashcroft*, 371 F.3d 532 (9th Cir. 2004).

III. ANALYSIS

As the moving party, MVCC argues that the attorney-client privilege does not protect the requested document. In both the moving and reply pleadings MVCC details the County’s

practice of using the document to process every permit application within WRIA 48, which MVCC argues rids the document of any privilege. MVCC cites to testimony from County representatives that indicates the document has become part of the planning department's normal course of processing permits. County employee Palmer is tasked with determining legal available water as a core function of processing building permits, and she utilizes the document to make that determination. In fact, Palmer testified she uses the document as a tool to make a legal available water determination for every permit application. Such use of the document is corroborated by meeting minutes of the Okanogan County Board of Commissioners. MVCC's reply pleadings cite Palmer's deposition to succinctly describe this process. If, using the document, Palmer determines there is not legal available water, the permit application is denied. If using the document Palmer determines there is adequate legal water, the permit is forwarded for further determination. The document is used for a "make or break decision" in permitting, which is a core function of Okanogan County.

Okanogan County bears the burden to prove that attorney-client privilege does protect this document from disclosure under PRA. Okanogan County previously disclosed a redacted version of the document. They argue that the redacted information within the document is attorney-client privilege and protected. The County argues that the document was a legal memorandum prepared by outside counsel to provide guidance on how to interpret and comply with an Okanogan County Superior Court decision by Judge Henry Rawson on November 5, 2021. The County argues this legal memo informs her analysis for each permit application. To ensure she followed each step, she marked up copies of the legal memo. The County argues that the checklist "simply prompts or reminds" Palmer to think about and evaluate how existing law might apply to the facts of a particular application. The County argues the document does not create new requirements for the public; nor does evaluating the questions in the checklist bind Ms. Palmer to a particular decision on an application. Rather, the County claims Palmer uses the document as legal advice to conduct her analysis and to inform her decisions. Okanogan County also argues the document is exempt from production as attorney "opinion" work product relevant to a controversy under RCW 42.56.290.

In its reply briefing, MVCC continues to argue how the document is a key part of the County's formal permitting process. MVCC describes how the document has become part of the planning department's normal course of processing permits. The County repeatedly and publicly invoked the document in its public Board of Commissioner meetings as the means by which the Planning Department was going to process permit applications to determine legal available water. At one meeting, Palmer updated the Board and noted that the Planning Department has "processed 52 site analysis in the Methow regarding water checklists and they try to keep track and treat everyone the same". Palmer's own testimony clarifies how the document is utilized in the decision making process. Each separate permit uses a new copy of the original document and on each copy there is written the name, parcel number, and numerous other facts regarding that particular permit application and properties relevant to determining legal available water. These are facts added to the document by Palmer and not by an attorney. MVCC argues that this process creates a separate public regard for each permit. Further, MCC asserts that the document is not attorney work product as it does not relate to a specific controversy.

IV. CONCLUSION OF LAW

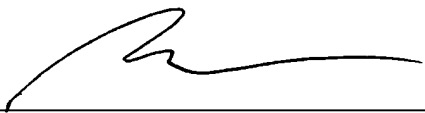
By agreement of the parties this Court conducted an in camera review of the document. This Court concludes that MVCC submitted a narrow and proper request for disclosure of records under the PRA. The majority of the document in question is a public record, is not work product, and is not protected by attorney-client privilege. Although prepared by an attorney, most of the document in question has been used dozens of times by the County while performing the permitting process which is one of the County's core functions. Because the attorney-client privilege does not apply to this document this Court makes no conclusions about any waiver of said privilege by the County. There is no specific controversy for which this document could have been prepared that would invoke the work product exemption. All portions of the document following the heading "SUBDIVISION APPLICATIONS", including subsequent footnotes, should be disclosed.

V. ORDER

Therefore, it is hereby **ORDERED**:

Defendants' Motion for Order to Show Cause is GRANTED and the County must allow inspection or copy of the requested records. The document may first be redacted so that only the contents of the document following the heading "SUBDIVISION APPLICATIONS", including subsequent footnotes, will be disclosed.

DATED this 13th day of December, 2023.



Court Commissioner Robert R. Colbert