

HEALTH LAW UPDATE

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Clearer Guidelines on Public Disclosure Requests

by Lee Kuo and Nick Beermann*

As any public agency or municipal corporation is well-aware, Washington's Public Disclosure Act ("PDA") requires public agencies to make identifiable public records available to any person who asks for them. subject to certain exceptions. In a recent case with clear ramifications for public agencies and municipal corporations, the Washington Supreme Court held that agencies are not required to comply with overbroad PDA requests where a public records request lacks the required reasonable clarity to identify what documents are being sought. The Court also held that public agencies and municipal corporations do not have to produce documents under the PDA where the documents are protected by the attorney-client privilege.

Hangartner v. City of Seattle, published on May 20, 2004, involved two separate PDA requests. In one request, an individual requested documents relating to the construction of Seattle's light rail transit system from the City of Seattle. In the second request, the group, Citizens Against the Monorail (Citizens), requested documents relating to the development of a new monorail line in Seattle from the Elevated Transportation Company (ETC) (now known as the Seattle Monorail Project). In both requests, most of the requested documents were produced, but some were withheld under the claim that they were exempt from disclosure. The ETC further claimed that it was excused from producing the withheld documents because the PDA request was overbroad.

Requests Must Be Identifiable

Previous cases asserted that at a minimum, a PDA request must provide notice that a document request is being made pursuant to the PDA and must identify the documents sought with reasonable clarity to allow an agency to locate them. In Hangartner, Citizens asked to inspect "all books, records, documents of every kind and the physical properties" of the ETC. The ETC claimed that because this PDA request was overbroad, it was excused from producing the withheld documents. The Court agreed with the ETC and reasoned that if agencies were required to comply with overbroad requests, it would render the PDA's requirement that agencies produce only "identifiable public records" meaningless. The Court then determined that a request for all of an agency's documents lacks the required reasonable clarity to identify the particular documents being sought. Therefore, such a request may be deemed invalid and excuse an agency from producing certain requested documents.

A Real Threat or Anticipation of Litigation Must Be Present for the Controversy Exemption

Hangartner also analyzed the PDA's controversy exemption, which exempts from public disclosure those records "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 dis-

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covery for causes in the superior courts." Obviously, the key question is when is something "relevant to a controversy"?

In Hangartner, the City of Seattle contended that the withheld documents were exempted from disclosure under the controversy exemption because a "litigation-charged atmosphere" existed at the time the documents were created, and thus they were created in reasonable anticipation of litigation. The Court rejected the City's claim of exemption, noting that a "litigation-charged atmosphere" was similar to the definition of "relevant to a controversy" that the Court had previously declined to adopt. The Court then held that because the City had failed to establish that there was any threat or reasonable anticipation of litigation, the withheld documents were not protected from disclosure under the controversy exemption.

Under the Court's reasoning, for municipal corporations and public agencies to avoid disclosure under the "controversy exception" to the PDA, there must be something definite demonstrating a real threat or reasonable anticipation of litigation (in the absence of an actual litigated case) rather than just a controversial public environment or a public debate surrounding an agency or one of its projects.

A Broader Attorney-Client Privilege?

While the Court limited the scope of the controversy exception to public disclosure, it appeared to broaden the scope of what is protected from disclosure under the attorney-client privilege.

The PDA contains an exception for disclosure of documents where "other statutes" exempt

or prohibit disclosure of specific information or records. In Hangartner, the City of Seattle asserted that the statutory attorney-client privilege is an "other statute" that prohibits the disclosure of certain records, and therefore, it was entitled to withhold documents under this privilege. The Court did find that the statutory attorney-client privilege is an "other statute" under the PDA which prohibits or exempts disclosure of certain information or documents. The Court reasoned that when the legislature added the "other statute" exception to the PDA, it could have easily excluded the attorney-client privilege statute. Because the legislature failed to do this, the Court was willing to recognize the privilege as a PDA exemption.

Although agencies may find protection under the attorney-client privilege if they choose to withhold certain requested documents, agencies must be careful to ensure that the withheld documents are, in fact, protected by the privilege. The attorney-client privilege protects communications and advice between an attorney and a client. Therefore, for a document to be protected by this privilege, it must be prepared for the explicit purpose of such communications. Merely cc'ing your attorney will not necessarily make something privileged. Documents prepared for other purposes will not be protected by the privilege.

In Conclusion . . .

It is clear from *Hangartner* that public agencies and municipal corporations now have greater leverage in denying disclosure to PDA requests where such requests are overbroad and do not seek "identifiable" information. Those same agencies also appear to now have a stronger argument for invoking the attorney-

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client privilege to prevent disclosure of materials protected under that privilege. simply labeling certain materials "relevant to a controversy" to avoid public disclosure will not work unless there is a real threat or anticipation of litigation.

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